82-1385

No. 82-_____

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN RE INTERNATIONAL HARVESTER COMPANY and
IH STEEL CORPORATION,

Petitioners.

SPECIAL FILING OF UNREPORTED CASES RE PETITION FOR WRITS OF PROHIBITION AND MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS AND THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Robert W. Hallock
(Counsel of Record)
George D. Newton, Jr.
Marion B. Adler
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2042

Vern Countryman
1557 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4614

Wilbur F. Pell, III
401 North Michigan Avenue
Chicago, Illinois 60611
(312) 836-2171

Attorneys for Petitioners

February 16, 1983

1. GAF Corp. v. Johns-Manville Corp. (In re Johns-Manville Corp.), No. 82-B-11656, Adv. No. 82-6221A (Bankr. S.D.N.Y. January 10, 1983).

2. Prudential Ins. Co. v. Stouffer Corp. (In re Northland Point Partners), No. 82-5387-W, Adv. Nos. 82-2277-W & 82-2332-W (E.D. Mich. January 7, 1983.

3. Color Craft Press Ltd. v. Nationwide Shopper Systems, Inc. (In re Color Craft Press, Ltd.), No. 81M3184, Adv. No. 82-PM-974 (Bankr. D. Utah February 7, 1983).

4. Gillman v. Preston Family Inv. Co. (In re Richardson), No. 82C-736, Adv. No. 82PC-746 (Bankr. D. Utah February 7, 1983.

5. In re Conley, No. 382-990 (Bankr. M.D. Tenn. January 26, 1983).

6. Walter E. Heller & Co. v. Matlock Trailer Corp. (In re Matlock Trailer Corp.) No. 382-2778, Adv. No. 382-755 (Bankr. M.D. Tenn. January 26, 1983).

7. Still v. First Bank (In re Jorges Carpet Mill Inc.), No. 1-80-2516, Adv. No. 1-82-638 (Bankr. E.D. Tenn. January 31, 1983).

8. Docter v. Gleicher (In re Stillman), No. 81-1-964, Adv. No. 82-73A (Bankr. D. Md. January 13, 1983).

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - -x

In the Matter

of 82 B 11656

through

JOHNS-MANVILLE CORPORATION, et al. 82 B 11076

Debtor

- - - - - - - - - - - - - - - -x

GAF CORPORATION, KEENE CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., H.K. PORTER COMPANY, INC., PITTSBURGH CORNING CORPORATION, GARLOCK, INC., EAGLE-PICHER INDUSTRIES, INC., THE CELOTEX CORPORATION and FIBERBOARD CORPORATION, on behalf of themselves and the unofficial committee of Asbestos Case Co-Defendants,

Plaintiffs,

vs.

JOHNS-MANVILLE CORP., et al.,

Defendants.

- - - - - - - - - - - - - - - -x

DECISION NO. 1 AND ORDER IN RELATED AUTOMATIC STAY PROCEEDINGS

A copy of this Opinion is set forth on pages A-20 through A-83 of the Appendix in No. 82-1242.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

NORTHLAND POINT PARTNERS,

Debtors.

Case No. 82-05387-W

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Plaintiff,

Adversary No. 82-2277-W

v.

THE STOUFFER CORPORATION,

Defendant.

NORTHLAND POINT PARTNERS,

Plaintiff,

Adversary No. 82-2332-W

v.

THE STOUFFER CORPORATION,

Defendant.

ORDER

ORDER

This cause is before the court on appellant Stouffer Corporation's motion challenging the constitutionality of an Interim Rule governing the administration of the bankruptcy system adopted by the United States District Court for the Eastern District of Michigan. After a careful review of the relevant statutory and case law, we remain persuaded that this Interim Rule, adopted in response to the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ___ U.S. ___, 50 U.S.L.W. 4892 (June 28, 1982), is constitutional and valid.

We hold that Marathon does not create a jurisdictional lapse. The relevant statutory provisions taken singularly and conjunctively manifest the Congressional intention that at the very least federal district courts would retain jurisdiction of matters arising under Title 11 or arising in or related to cases under Title 11 until April 1, 1984. Congress carefully kept in effect, until 1984, statutory provisions that give the federal district courts "original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy." 28 U.S.C. § 1334. Congress also made clear, through incorporation by reference, that the jurisdictional powers of the federal district courts would not change during the transitional period. §§ 404 and 405, Bankruptcy Reform Act of 1978 (P.L. 95-598). Congress purposely included these provisions to satisfy its stated concern over the constitutionality of the broad jurisdictional grant afforded to bankruptcy judges under the act. It is apparent that Congress, at a minimum, wanted to

maintain federal court jurisdiction over matters arising in bankruptcy proceedings.

Alternatively, it appears to us that the only jurisdictional grant that was deemed non-severable in Marathon was that given to the Article I bankruptcy courts. The two concurring justices noted that "This grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts." Marathon, id. at 4903. In considering the entire structure of the Bankruptcy Reform Act of 1978, it appears to us that the power conferred by 28 U.S.C. § 1471(a) and (b) was arguably not affected by the Marathon decision. We recognize, however, that Congress did not want federal district courts to permanently exercise the jurisdictional power found in such provisions as present § 1334 of Title 28. See, Marathon, id. at 4902, n.40. The district courts are vested at least until 1984 with jurisdiction over bankruptcy matters. The rule that Stouffer now challenges was promulgated in complete accord with the inherent power of an Article III federal district court to dispose of judicial matters that come before it. This interim rule provides that the district courts may delegate many of the duties they must perform under their bankruptcy power to bankruptcy judges. The authority for this is found in § 105 of the Bankruptcy Reform Act of 1978 (11 U.S.C. § 105), which gives courts of bankruptcy the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," and in Bankruptcy Rule 927, which gives bankruptcy courts the power to

adopt "rules governing practice and procedure under the Act." This delegation of power is consistent with the long tradition established by Congress of a bankruptcy court consisting of two judicial officers and the clear intent of the Congress to continue a two-officer court of bankruptcy through 1984.

Accordingly, we hold that the Emergency Rule adopted by the United States District Court for the Eastern District of Michigan pursuant to a resolution of the Sixth Circuit Judicial Council is constitutional and valid. A more detailed analysis responding to all of appellant's contentions will be forthcoming in a Memorandum Opinion from this court.

NOW, THEREFORE, IT IS ORDERED that appellant Stouffer's motion challenging the Interim Rule be and the same hereby is DISMISSED;

IT IS FURTHER ORDERED that appellant's motion for a stay of bankruptcy proceedings be and the same hereby is DENIED.

Robert E. DeMascio
United States District Judge

Dated: January 7, 1983

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re COLOR CRAFT PRESS, LTD., a Utah limited partnership, Debtor. COLOR CRAFT PRESS, LTD., a Utah limited partnership, Plaintiff, vs. NATIONWIDE SHOPPER SYSTEMS, INC., Defendant.	Bankruptcy No. 81M-03184 Civil Proceeding No. 82PM-0974 MEMORANDUM OPINION

Appearances: William G. Fowler, R. Kimball Mosier, Michael N. Zundell, of Roe and Fowler, Salt Lake City, Utah, for the plaintiff; Robert A. Bentley, Salt Lake City, Utah, for the defendant.

I. INTRODUCTION AND BACKGROUND

On November 6, 1978, Congress enacted Pub. L. No. 95-598, the first major revision of bankruptcy law in the United States since 1938. The law contains sweeping jurisdictional reforms. See, Pub. L. No. 95-598, Section 241(a), 92 Stat. 2668 (1978), codified at 28 U.S.C. Sections 1471-1482.[1] Section 1471, the

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[1] For an overview of these jurisdictional reforms, see, e.g., 1 COLLIER ON BANKRUPTCY ¶3.01 et seq. (15th ed. 1982); Babitt, "The Bankruptcy Court, Its Judges, Their Jurisdiction and Powers, and Appeals, Under Title 11 of the 1978 Bankruptcy Reform Act: Transition and Beyond," 1979 ANN. SURV. BANK. L. 89; Bondurant,

linchpin of these reforms, confers jurisdiction on a newly created "bankruptcy court," using a two step process. First, Sections 1471(a) and 1471(b) grant original and exclusive jurisdiction of all "cases" under title 11 and original but not exclusive jurisdiction of all "proceedings" arising under title

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"The Bankruptcy Court As a Constitutional Court," 45 AM. BANK. L. J. 235 (1971); Broude, "Jurisdiction and Venue Under the Bankruptcy Act of 1973," 48 AM. BANK. L. J. 231 (1974); Broude, "The Referee in Bankruptcy As An Article I Judge: A Reply to Mr. Bondurant," 46 AM. BANK. L.J. 39 (1972); Cyr, "Structuring A New Bankruptcy Court: A Comparative Analysis," 52 AM. BANK. L. J. 141 (1978); Drake, "The Judges' Bill and the Commission's Bill: A Question of Access to the Judicial Process," 26 MERCER L. REV. 1009 (1975); Eisen and Smrtnik, "The Bankruptcy Reform Act of 1978--An Elevated Judiciary," 28 DePAUL L. REV. 1007 (1979); Finley, "Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court," 1982 ANN. SURV. BANK. L. 1; George, "The Bankruptcy Appellate Panels: An Unfinished Experiment," 1982 B.Y.U. L. REV. 205; Kennedy, "The Bankruptcy Court Under The New Bankruptcy Law: Its Structure And Jurisdiction," 55 AM. BANK. L. J. 63 (1981); Kennedy, "The Bankruptcy Court Under The New Bankruptcy Law: Its Structure, Jurisdiction, Venue, And Procedure," 11 ST. MARY'S L. J. 251 (1979); King, "Bankruptcy Code--Specialized Court Supported," 52 AM. BANK. L.J. 193 (1978); Klee, "Legislative History of the New Bankruptcy Code," 54 AM. BANK. L.J. 275 (1980); Krattenmaker, "Article III and Judicial Independence: Why The New Bankruptcy Courts Are Unconstitutional," 70 GEO. L. J. 297 (1981); Lieb, "Jurisdiction and Venue in Bankruptcy Litigation," 1982 ANN. SURV. BANK. L. 69; Levin, "Bankruptcy Appeals," 58 NO. CAR. L. REV. 967 (1980); Levine, "An Enhanced Conception of the Bankruptcy Judge: From Case Administrator to Unbiased Adjudicator," 84 W. VA. L. REV. 637 (1982); Levit and Mason, "Where Do We Go From Here? Bankruptcy Administration Post-Marathon," 87 COM. L. J. 353 (1982); Plumb, "The Tax Recommendations of the Commission on the Bankruptcy Laws--Tax Procedures," 88 HARV. L. REV. 1360 (1975); Reed, Sagar, and Granoff, "Subject Matter Jurisdiction, Abstention and Removal Under The New Federal Bankruptcy Law," 56 AM. BANK. L. J. 121 (1982); Rifkind, "Bankruptcy Code--Specialized Court Opposed," 52 AM. BANK. L. J. 187 (1978); Note, "Determining Proper Venue of Civil Proceedings Related to a Bankruptcy Case," 1982 ANN. SURV. BANK. L. 393; Note, "Tenure and Salary Clause Restrictions on the Jurisdiction of Article I Courts," 96 HARV. L. REV. 257 (1982); Note, "Bankruptcy and the Limits of Federal Jurisdiction," 95 HARV. L. REV. 703 (1982); Note, "Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings," 59 TEX. L. REV. 325 (1981).

11 or arising in or related to "cases" under title 11 to the district court. Second, Section 1471(c) mandates that all jurisdiction granted to the district court shall be exercised by the bankruptcy court. Section 1471(e), which does not use this two step process, grants exclusive jurisdiction over property of the debtor to the bankruptcy court. Section 1478(a), which likewise does not use a two step process, provides for removal of "any claim or cause of action in a civil action" from district or state courts to the bankruptcy court. Under Section 1478(b), "such claim or cause of action" is subject to remand "on any equitable ground" by the bankruptcy court. A decision under Section 1478(b) is nonreviewable "by appeal or otherwise." Most other orders of the bankruptcy court, however, are appealable, as of right or by permission, to the district court. See, Pub. L. No. 95-598, Section 238(a), 92 Stat. 2667 (1978), codified at 28 U.S.C. Section 1334. These reforms, in large measure, were designed to sever the umbilical relation which had existed between the district court and bankruptcy matters. The district court now exercises appellate not supervisory jurisdiction over the bankruptcy court. The truncated decisionmaking of former law is replaced with comprehensive power over bankruptcy problems in a single forum.

These reforms, however, were implemented during a period of transition, from the effective date of the legislation, October 1, 1979, until March 31, 1984. See, Pub. L. No. 95-598, Sections 401-411, 92 Stat. 2681-2688 (1978)(uncodified). "Courts of bankruptcy" as defined "under Section 1(10) of the Bankruptcy Act, created under Section 2a of the Bankruptcy Act, and existing

on September 30, 1979," are continued, but as a "separate department" of the district court, and given jurisdiction under Section 241(a). See, Pub. L. No. 95-598, Sections 404(a) and 405(b), 92 Stat. 2683, 2685 (1978). Consistent with Section 1471(c), cases and proceedings, in almost all regards, are referred from the district judge to the bankruptcy judge within the court of bankruptcy. See, Pub. L. No. 95-598, Section 405(a)(1), 92 Stat. 2685 (1978). And the system for appeals to the district court, under Section 1334, is made effective in Pub. L. No. 95-598, Sections 405(c)(1)(C) and 405(c)(2), 92 Stat. 2685 (1978). The courts of bankruptcy thus are assimilated into the new order.

On June 28, 1982, the Supreme Court ruled that Section 241(a), insofar as it authorizes non-Article III bankruptcy judges to hear certain proceedings, is unconstitutional. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982)(hereinafter Marathon). A majority of the Court did not agree on what were unconstitutional proceedings under Section 241(a). Both plurality and concurring opinions agreed, however, that since Section 241(a) was nonseverable, it must be wholly invalidated. The Court stayed its judgment, first until October 4, and then until December 24, allowing time for curative legislation.

By December 24, Congress had not acted, and the stay of judgment expired. On December 27, in lieu of legislation, the district court entered a rule to fill the jurisdictional gap. The rule assumes that the district court has jurisdiction over cases and proceedings in bankruptcy, and in essence refers them

to the bankruptcy judges who act for the district court as special masters. The district court, on its own initiative, or on motion by a party, may withdraw a reference in whole or in part from the bankruptcy judges. The bankruptcy judges, with certain exceptions, are empowered to perform "all acts and duties necessary for the handling of those cases and proceedings." The rule divides "related" from "unrelated" proceedings. Related proceedings "are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or state court," and include, without limitation, "claims brought by the estate against parties who have not filed claims against the estate." Related proceedings do not include matters growing out of the administration of an estate. Nor is a proceeding "related" "merely because the outcome will be affected by state law." If the proceeding is "related," the "bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge." The bankruptcy judge, however, may enter orders in "unrelated" proceedings. A district judge must review proposed orders in "related" proceedings, even absent appeal by a party. A district judge must also review orders in "unrelated" proceedings when certified by a bankruptcy judge. The scope of review, in any case, is unlimited: it may be de novo, and the district judge "need give no deference to the findings of the bankruptcy judge."

II. PROCEDURAL POSTURE

Plaintiff is a debtor in possession under Chapter 11 of the Bankruptcy Code. On August 20, 1982, it commenced this proceeding against defendant. The complaint alleges that plaintiff performed services under a contract with defendant, that defendant breached this contract, and that damages equal $14,986 plus attorneys fees and interest. On November 2, defendant answered the complaint and counterclaimed for negligence and breach of contract, seeking damages of $28,600. Defendant also challenged the jurisdiction of the bankruptcy court in light of Marathon. On December 16, the jurisdiction of the bankruptcy court was questioned again in a proposed pretrial order.

On December 24, as noted above, the stay of judgment expired, and on December 27, the district court entered the rule. These events shifted the focus of inquiry from the bankruptcy court to the district court. The parties agree, and the rule in its preamble confirms, that the bankruptcy court no longer has jurisdiction to try this case. The parties disagree, however, on whether the district court has this authority, and if so, whether it may be deflected to the bankruptcy judges through the rule. Because of this disagreement, and in the face of an impending trial date, the parties filed briefs on January 4, 1983, and argument was heard January 5.

Plaintiff argues that the rule is valid because the district court has jurisdiction over bankruptcy cases and proceedings under Sections 1471(a) and 1471(b), either as amendments to title 28, or as implemented during transition under Sections 404 and 405.

This bankruptcy judge must address the validity of the rule because it refers the entire proceeding, including issues of jurisdiction, to him. The district court, under the rule, may withdraw any reference, with issues of jurisdiction, from a bankruptcy judge, but has not done so in this case. Nor has any party sought in the district court a withdrawal of reference from the bankruptcy judge in this case. Instead, they have made arguments on jurisdiction here. Thus, a decision is unavoidable.

The rule is invalid insofar as it relies upon jurisdiction under Sections 1471(a), 1471(b), and the transition statutes. No other jurisdictional basis validates the rule in this proceeding.[2] Thus, the complaint must be dismissed.

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Plaintiff has not asked whether the prospective character of Marathon or whether federal question jurisdiction under 28 U.S.C. Section 1331 salvages this proceeding, but these questions have been answered elsewhere in the negative. See, e.g., In re Richardson, C.P. No. 82PC-0746 (slip opinion)(Bky. D. Utah, February 7, 1983). Nor has it argued that the counterclaim of defendant confers jurisdiction by consent, an argument which, in any event, would be unavailing. See, e.g., SEN. REP. No. 95-989, 95th Cong., 2d Sess. 153 (1978)("The idea of possession and consent as bases for jurisdiction is eliminated"); H.R. REP. No. 95-595, 95th Cong., 1st Sess. 445 (1977)(same); In re Motion to Dismiss: Constitutionality of Jurisdiction of the Bankruptcy Court, 23 B.R. 335, 344 (Bky. N.D. Ga. 1982). But see, In re The National Sugar Refining Company, 22 B.R. 279, 280 (Bky. S.D.N.Y. 1982). But cf. In re Cox Cotton Company, 3 C.B.C. 2d 615, 625 (E.D. Ark. 1980); In re Hotel Associates, Inc., 22 B.R. 964, 965 (Bky. E.D. Pa. 1982).

Plaintiff has argued that the district court has jurisdiction under old 28 U.S.C. Section 1334. It is unnecessary to decide whether old Section 1334 validates the rule because old Section 1334 conferred no more than "summary" jurisdiction on the district court. See, e.g., 1 MOORE's FEDERAL PRACTICE ¶0.61[3] (2d ed. 1982), 13 C. Wright, A. Miller, and E. Cooper, FEDERAL PRACTICE AND PROCEDURE §3570 (1975). Since this proceeding is "plenary" rather than "summary," id., it would not be sustainable in any event. Moreover, the survival of old Section 1334, in the wake of the Reform Act, has been questioned. See, e.g., H.R. REP. No. 97-807, 97th Cong., 2d Sess. 88-107 (1982).

III. SECTIONS 1471(a) AND 1471(b)

Plaintiff argues that Marathon eliminated the jurisdiction of bankruptcy courts under Section 1471(c) but did not disturb the jurisdiction of district courts under Sections 1471(a) and 1471(b). This residuum of power, it is said, may be delegated by the district court to others, bankruptcy judges in this case who act as special masters. This argument is unconvincing, however, for at least two reasons. First, Marathon held that Section 241(a) was nonseverable and struck the entire statute, leaving no remnant of power in either bankruptcy or district courts. Second, assuming that Section 241(a) is severable, the mandatory reference of cases and proceedings to bankruptcy courts under Section 1471(c) prevents the exercise of power by district courts under Sections 1471(a) and 1471(b).

A. Nonseverability

Marathon expunged Section 241(a) which embraces all not merely part of Section 1471. The plurality opinion did not parse the statute making distinctions between district and bankruptcy courts. Indeed, it refused to route proceedings to the district court because the statute is nonseverable and "it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Article III, in the way that will best effectuate the legislative purpose." Marathon, supra at 2879-2880 and n. 40. The concurring justices agreed, citing footnote 40. Id. at 2882 (Justice Rehnquist, concurring opinion).[3] Justice White, in dissent, chides the majority for

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3 The majority did not delineate acceptable from unacceptable claims or legitimate from illegitimate forums because it feared

its "sweeping invalidation" of Section 241(a), Marathon, supra at 2884 n. 3 (Justice White, dissenting opinion), acknowledging the holding on nonseverability.[4] The Chief Justice also may have

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"the delay and expense of jurisdictional disputes," Marathon supra at 2880 n. 40, a fear which was prescient in light of recent events.

4 Justice White, joined by Chief Justice Burger and Justice Powell, criticized the notion that non-Article III judges may consider questions of federal but not state law, observing that "clearly this ground alone cannot support the court's invalidation of §241(a) on its face. The plurality concedes that in adjudications and discharges in bankruptcy, 'the manner in which the rights of debtors and creditors are adjusted,' ante, at 2878, n. 36, are matters of federal law. Under the plurality's own interpretation of the cases, therefore, these matters could be heard and decided by Article I judges. But because the bankruptcy judge is also given authority to hear a case like that of petitioner against Marathon, which the Court says is founded on state law, the Court holds that the section must be stricken down on its face. This is a grossly unwarranted emasculation of the scheme Congress has adopted. Even if the Court is correct that such a state law claim cannot be heard by a bankruptcy judge, there is no basis for doing more than declaring the section unconstitutional as applied to the claim against Marathon, leaving the section otherwise intact. In that event, cases such as this one would have to be heard by Article III judges or by state courts--unless the defendant consents to suit before the bankruptcy judge--just as they were before the 1978 Act was adopted. But this would remove from the jurisdiction of the bankruptcy judge only a tiny fraction of the cases he is now empowered to adjudicate and would not otherwise limit his jurisdiction." Id. at 2883-2884.

As an afternote to this observation, he remarks: "The plurality attempts to justify its sweeping invalidation of §241(a), because of its inclusion of state-law claims, by suggesting that this statutory provision is nonseverable. Ante, at n. 40. The concurring Justices specifically adopt this argument as the reason for their decision to join the judgment of the Court. The basis for the conclusion of nonseverability, however, is nothing more than a presumption: 'Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances, we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters.' Ibid. Although it is possible, as a historical matter, to find cases of this court supporting this presumption, see, e.g., Williams v. Standard Oil Co., 278 U.S. 235, 242, 49 S. Ct. 115, 117, 73 L. Ed. 287 (1929), I had not thought this to be the contemporary approach to the problem of severability, particularly when dealing with federal statutes. I would follow the approach taken

recognized the implications of nonseverability since he invites Congress, not the judiciary, to repair the damage wrought by the judgment of the court. Marathon, supra at 2882 (Chief Justice Burger, dissenting opinion.)[5]

Moreover, nonseverance makes sense. If Section 1471(c) and the bankruptcy court are excised from Section 241(a), the statute becomes dysfunctional. The district court, for example, might have partial jurisdiction, viz., over cases and proceedings under Sections 1471(a) and 1471(b), but the balance of jurisdiction, over property, reserved to the bankruptcy court under Section 1471(e), is left in limbo.[6] Sections 1478(a) and

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by the Court in Buckley v. Valeo, 424 U.S. 1, 108, 96 S. Ct. 612, 677, 46 L. Ed. 2d 659 (1976): 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' Quoting Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062 (1932). This presumption seems particularly strong when Congress has already 'enacted those provisions which are within its power, independently of that which is not' ----i.e., in the older Bankruptcy Act." Id. at 2885 n. 3. See also, infra note 16, at 26-28.

5 Other authorities have opined that Marathon declared Section 241(a) nonseverable and extirpated the statute. See, e.g., Friend, "League President Urges Elevation of Bankruptcy Courts to Article Three Status at Congressional Subcommittee Hearings," 87 COM. L. J. 394, 396 (1982); Levit and Mason, "Where Do We Go From Here? Bankruptcy Administration Post-Marathon," 87 COM. L.J. 353, 355-357 (1982); Note, "Tenure and Salary Clause Restrictions on the Jurisdiction of Article I Courts," 96 HARV. L. REV. 257, 260 (1982); In re Cherry Pond Coal Company, 21 B.R. 592, 593 (S.D. W. Va. 1982); In re Motion to Dismiss: Constitutionality of Jurisdiction of the Bankruptcy Court, 23 B.R. 334, 338. (Bky. N.D. Ga. 1982); In re Otero Mills, Inc., 21 B.R. 645, 647 (Bky. D.N.M. 1982); In re M.J.S. Apparel, Inc., 22 B.R. 736, 737 (Bky. E.D.N.Y. 1982); In re Rapco Foam, Inc., 22 B.R. 637, 640 (Bky. W.D.N.Y. 1982); In re Jorges Carpet Mills, Inc., Adv. Pro. No. 1-82-0638 (slip opinion at 9-10)(E.D. Tenn., January 31, 1983); In re Cumberland Enterprises, Inc., 22 B.R. 626, 630-631 (Bky. M.D. Tenn. 1982). But see, In the Matter of Northland Point Partners, Adv. Nos. 82-2277-W and 82-2332-W (order)(E.D. Mich., January 7, 1983); Moore v. White Motor Corporation, 24 B.R. 200, 202-203 (N.D. Ohio 1982); In re Braniff Airways, Incorporated, Misc. No. 4-221-E (slip opinion) (N.D. Texas, January 20, 1983); In re Stillman, Adv. Pro. No. 82-0073A (slip opinion) (Bky. D. Md., January 13, 1983). But cf. In re Vaniman International, Inc., 22 B.R. 166, 195-196 (Bky. E.D.N.Y. 1982).

6 The distinction between jurisdiction over cases and proceedings, first to district courts, and then to bankruptcy

1478(b) would be unserviceable, since they contemplate removal from district and state courts to a bankruptcy court,[7] and under appropriate circumstances, remand by a bankruptcy court. Venue,

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courts, under Sections 1471(a), 1471(b), and 1471(c), and jurisdiction over property of the debtor, conferred on bankruptcy courts under Section 1471(e), has not gone unremarked. Collier, for example, notes that "[w]hat subsections (a)-(c) of Section 1471 do for title 11 cases and civil proceedings, Section 1471(e) does for property; that is, it leaves no doubt as to the jurisdictional reach of the bankruptcy court over property. Interestingly this is the one type of jurisdiction as to which vesting is not first in the district courts. As such, it may be that subsection (e), which appeared in none of the proposed House or Senate bills, and was added at the House-Senate conference, was merely intended to make explicit that all property of the debtor, which becomes property of the estate, is in custodia legis of the bankruptcy court." 1 COLLIER ON BANKRUPTCY ¶3.01[g], at 3-55 (15th ed. 1982). See also, P. Murphy, CREDITORS' RIGHTS IN BANKRUPTCY ¶2.02, at 2-4 and n. 1 (1981). Section 1471(e), among other things, underpins the power of turnover found at 11 U.S.C. Section 542, 1 COLLIER ON BANKRUPTCY, supra ¶3.01[g], at 3-56, which if denied to the district court, acting under the rule, would impede business reorganizations. See, e.g., United States v. Whiting Pools, Inc., 674 F. 2d 144 (2d Cir. 1982); In re Alpa Corp., 11 B.R. 281 (Bky. D. Utah 1981).

7 The legislative history of Section 1478(a) indicates an intent to deny removal jurisdiction in bankruptcy matters to the district court. The Senate bill, Section 219(a), S. 2266, 95th Cong., 2d Sess. (1978), like Sections 1471(a), 1471(b), and 1471(c), used a two step process in vesting removal jurisdiction, first through the district court, and then to the bankruptcy court. See, SEN. REP. No. 95-989, 95th Cong., 2d Sess. 156 (1978). This procedure, however, was rejected and replaced with Section 1478(a). Collier observes that the Senate bill was "truer" to the two step "vesting" process used in Section 1471: "The word 'truer' was used ...for the following simple reason: The section as passed ignores the fact that jurisdiction over civil proceedings is vested first in the federal district courts and then in the bankruptcy courts. The Senate version of section 1478 recognized this fact by providing for removal to the district court; the House version and the section as enacted can be said to have ignored or bypassed this two-step jurisdictional grant by providing for direct removal to the bankruptcy court." 1 COLLIER ON BANKRUPTCY ¶3.01[2][b], at 3-62 (15th ed. 1982). Section 1478(a) thus "permits removal of a claim or cause of action to one court only--the bankruptcy court for the district in which the relevant civil action is pending. The language of the statute permits no exception." Id. ¶3.01[f][i], at 3-73. See also, Kennedy, "The Bankruptcy Court Under The New Bankruptcy Law: Its Structure, Jurisdiction, Venue, and Procedure," 11 ST. MARY'S L. J. 251, 286 n. 142 (1979).

in cases and proceedings, 28 U.S.C. Sections 1472-1477, provisional remedies, 28 U.S.C. Section 1479(c), jury trials, 28 U.S.C. Section 1480(b), the power to act in "equity, law, and admiralty," 28 U.S.C. Section 1481, are keyed to the bankruptcy not the district court.[8] Severance, in short, would unhitch the bankruptcy court from these procedural moorings. And since Section 241(a) may not be rewritten by rule, see, e.g., Pub. L. No. 95-598, Section 247, 92 Stat. 2672 (1975), amending 28 U.S.C. Section 2075, Ford Motor Company v. Transport Indemnity Company, 12 B.R. 143, 145-146 (E.D. Mich 1981), the district court would be left with a jurisdiction which is incomplete, rudderless, and in substantial measure, powerless. It seems improbable that the Supreme Court would expect district courts to handle bankruptcy cases and proceedings, many of which are complex and demanding, with such infirm and uncertain jurisdictional tools.

Finally, the stay of judgment, first to October 4, and then to December 24, confirms these views; if the damage could be papered over by rule, there would be no need for a stay. See, In re Motion to Dismiss: Constitutionality of Jurisdiction of the Bankruptcy Court, 23 B.R. 335, 337, 338 (Bky. N.D. Ga. 1982); In re M.J.S. Apparel, Inc., 22 B.R. 736, 737 (Bky. E.D.N.Y. 1982).

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Collier notes that the power to act in "equity, law, and admiralty," conferred on the bankruptcy court under Section 1481, is instrumental respecting other substantive provisions of the Code: "For example, entering an order for relief or an order of discharge under title 11 determines a status, one of the indicia of a decree in equity....The bankruptcy court may, under 11 U.S.C. §510(c)(1) subordinate claims 'under principles of equitable subordination.' Further, the ability of the court to fashion decrees giving 'adequate protection' when required by 11 U.S.C. §§362-64, is totally equitable in nature." 1 COLLIER ON BANKRUPTCY ¶3.01[5][b][ii], at 3-102 (15th ed. 1982). (Emphasis in original.)

The stay was deemed necessary to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication without impairing the interim administration of the bankruptcy laws." Marathon, supra at 2880. (Emphasis supplied.)[9] Indeed, the Supreme Court may have rulemaking power under Section 410, and if so, did not need to wait upon the district courts for an emergency resolution. See, Pub. L. No. 95-598, Section 410, 92 Stat. 2687 (1978). The failure to use this power may suggest an awareness that, absent legislative action, the bankruptcy system would face a jurisdictional abyss.[10]

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9 The Court realized that Section 241(a), in the words of Justice White, had been "emasculated." Rebuilding the statute, of necessity, means reallocation of judicial power over bankruptcy matters. (Indeed, the district court has done this by rule, reversing the mandate of Section 1471(c), and rechanneling authority to the district court, which in turn, has delegated it to the bankruptcy judges as special masters.) This reallocation of judicial power may be a legislative rather than a judicial prerogative. The holding of nonseverability may have been intended to preclude judicial interference with a legislative right. Cf. Finley, "Article III Limits On Article 1 Courts: The Constitutionality of the Bankruptcy Court," 1982 ANN. SURV. BANK. L. 1, 24.

10 Section 410 provides: "The Supreme Court may issue such additional rules of procedure, consistent with Acts of Congress, as may be necessary for the orderly transfer of functions and records and the orderly transition to the new bankruptcy court system created by this Act." On its face, the "orderly transition" language may be broad enough to supply a cure for Marathon. The legislative history, however, notes that rules promulgated under Section 410 will "be of an internal, administrative nature, and unlike the rules prescribed under 28 U.S.C. 2075, will not ordinarily affect litigants or parties in pending cases." H.R. REP. No. 95-595, 95th Cong., 1st Sess. 462 (1977). Whether the phrase "not ordinarily" implies that in extraordinary circumstances, like the present, the Court may issue a rule affecting parties in cases is uncertain. In any event, rules under Section 410 must be "consistent with Acts of Congress."

B. Section 1471(c)

Assuming that Section 241(a) be severable, Section 1471(c), which refers cases and proceedings to the bankruptcy court, precludes the exercise of jurisdiction by the district court.[11] This construction of Section 1471 is supported by the legislative history and case law.

1. Legislative History

The Reform Act was designed to mend the fractured jurisdiction of former law. Reformers, early on, targeted the bifurcated jurisdiction of district courts and the courts of

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There may be an exception to this rule. The district court may have original jurisdiction over proceedings in bankruptcy to enjoin another court or to punish certain criminal contempts. This exception is derived by implication, in part, from Section 1481 which denies these powers to the bankruptcy court. See, P. Murphy, CREDITORS' RIGHTS IN BANKRUPTCY ¶2.04, at 2-10 and ¶2.06, at 2-13 (1981); Kennedy, "The Bankruptcy Court Under The New Bankruptcy Law: Its Structure and Jurisdiction," 55 AM. BANK. L. J. 63, 69-70 n. 24, 74 n. 49, 79, 89 n. 114, 90 and n. 115 (1981). But see, 1 COLLIER ON BANKRUPTCY ¶7.05[1][a], at 7-58 (15th ed. 1982).

The exception for injunctions and contempts likewise explains Section 1471(d) which "does not prevent" a district court, under appropriate circumstances, from "abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." Some have suggested that Section 1471(d) demonstrates that the district court has general, original jurisdiction under Sections 1471(a) and 1471(b). This negative inference, however, is unpersuasive for at least two reasons. First, no negative inference may be drawn respecting the jurisdiction of the district court over cases under Section 1471(a), since Section 1471(d) governs proceedings only. Abstention over cases is determined by the bankruptcy court under 11 U.S.C. Section 305(a), and is nonreviewable by the district court under 11 U.S.C. Section 305(c). See, e.g., In re Colonial Ford, Inc., 9 B.C.D. 1108, 1111-1112 n. 10 (Bky. D. Utah 1982). Second, as discussed below, the legislative history and case law show that the district court may not exercise general, original jurisdiction over proceedings under Section 1471(b). This legislative history and case law may be reconciled with Section 1471(d), if at all, by reference to the exception for injunctions and contempts which has been carved out of Section 1471(c).

bankruptcy for abolition. The Commission on the Bankruptcy Laws of the United States, for example, noted that "a considerable part of a trustee's litigation to recover assets of the estate must be initiated in some court," including a district court, "other than the bankruptcy court." REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H. DOC. No. 93-137, pt. I, at 89 (1973). This "division of jurisdiction" was "objectionable" because it caused delay: "Not only are the proceedings in nonbankruptcy courts [such as the district court] likely to be paced more slowly with longer intervals between successive steps, but the dockets of the nonbankruptcy courts are likely to be more crowded and commencement of the trials more likely to be postponed in such courts than in bankruptcy courts. Delay is critical in cases under the Bankruptcy Act, particularly in the business cases where litigation is most likely to occur. This is true because of the prejudicial effect it might have on prospects for rehabilitating an enterprise in financial distress and the aggravated risk of deterioration of the estate in the course of liquidation." Id. It was believed that "[a] comprehensive grant of jurisdiction to the bankruptcy courts over all controversies arising out of any bankruptcy or rehabilitation case would greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money, and energy of the bankruptcy system and of those involved in the administration of debtors' affairs. It would foster the development of a more uniform, cohesive body of substantive and procedural law which would be applicable to the administration of estates under the Bankruptcy Act. The withdrawal from state and federal district

courts of jurisdiction of the so-called plenary proceedings, when coupled with the establishment of uniform federal standards and rules, as proposed by the Commission for adoption and application in lieu of the diverse state laws governing debtors' and creditors' rights, should eliminate a source of uncertainty and division of authority which has characterized bankruptcy law." Id. at 90-91. (Emphasis supplied.)

The Commission views were reduced to legislation which, after several years of study and revision, evolved into H.R. 8200, 95th Cong., 1st. Sess. (1977). H.R. 8200 would have established bankruptcy courts independent of the district courts. Assigning bankruptcy cases and proceedings to the district courts was considered but disapproved "for a variety of reasons":

> The district courts are generally overburdened. Their caseload has increased dramatically in recent years without a corresponding increase in the number of judges. Though a judgeship bill is presently pending in both Houses of Congress, the increased number of district judges proposed in those bills probably would be inadequate to absorb the bankruptcy caseload.
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> Second, the Speedy Trial Act requires that criminal matters be given precedence on the district court calendars. The Constitution does not require a "speedy trial" for bankruptcy matters as it does for criminal cases. Thus, criminal matters would continue to be accorded priority. However, the nature of bankruptcy is such that it, too, for practical reasons, requires expeditious disposition. The original Bankruptcy Act in 1898 left many matters to the State courts for disposition because often they were speedier forums than the bankruptcy courts. Today, however, the State courts are seriously overburdened, although the bankruptcy courts are nearly current with their dockets. Such delays as there are in bankruptcy cases often result from the need for a matter to proceed to decision in a State court. H.R. 8200 does much to alleviate the problem, but

> the change proposed would be to little avail if bankruptcy disputes were required to fight the judicial logjam caused by the Speedy Trial Act and by the volume of litigation pending in district courts. Assets would deteriorate; creditors would be delayed in recovering money to which they are justly entitled; and, to use the familiar medical metaphor, in business reorganization cases, the patient would die on the operating table while diagnosis slowly proceeded.
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> Third, assignment of bankruptcy disputes to the district judges would be generally unacceptable because district judges have long made clear their lack of interest in bankruptcy matters. In 1959, the Judicial Conference recommended legislation that would remove one of the last remaining functions of the district judges in bankruptcy cases: making an order of reference. The law now requires automatic reference, and district judges no longer have any involvement in bankruptcy cases. More recently, the Judicial Conference has made known its lack of interest in bankruptcy cases by its recommendation that they continue to be handled by bankruptcy judges, and not by district judges.
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> Finally, a generalist judge that only occasionally handled bankruptcy cases would not have a sufficient understanding of the law and the fact situations that arise in bankruptcy cases. He would be unable to make the quick decisions that these cases so often require. H.R. REP. No. 95-595, 95th Cong., 1st Sess. 14-15 (1977)

The Senate, in a counterproposal, S. 2266, 95th Cong., 2d Sess. (1978), rejected the court structure of H.R. 8200, but agreed that jurisdiction should not be divided between district and bankruptcy courts. S. 2266 established the bankruptcy court as an "adjunct" of the district court, but commissioned the bankruptcy court to exercise all of the jurisdiction of the district court. This delegation of jurisdiction meant that "[a]ctions that formerly had to be tried in the state court or in

the Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy court," SEN. REP. No. 95-989, 95th Cong., 2d Sess. 153 (1978). (Emphasis supplied.) See also H.R. REP. No. 95-595, supra at 445. Moreover, the "statutory scheme" of S. 2266 "[was] adopted [so that] the totality of this jurisdiction....shall be exercised by the bankruptcy court, which is created as an adjunct of each U.S. district court." SEN. REP. No. 95-989, supra at 153. (Emphasis supplied.) Elsewhere the Senate Report emphasizes that the "expanded jurisdiction vested in the U.S. district courts" is "delegated by statute for exercise exclusively by bankruptcy judges, subject always to review, as under present law, by the district courts," id. at 16 (emphasis supplied), and reemphasizes that "except where the bankruptcy court abstains from hearing an action or proceeding arising under or related to a case under title 11, all cases under title 11 and all civil actions and proceedings arising under or related to cases under title 11 are to be before the bankruptcy judge....[The amendments on jurisdiction], while conferring expanded jurisdiction in bankruptcy cases and related civil actions and proceedings directly upon the district courts, delegate the exclusive exercise of that jurisdiction at the trial level to bankruptcy judges." Id. at 18. (Emphasis supplied.)

The Senate version of the legislation was adopted and enacted as Section 1471 of the Reform Act. As noted above, it confers jurisdiction on the bankruptcy court using a two step process, first to the district court, and then to the bankruptcy court. Floor leaders of the legislation explained, however, in

words which echoed the Commission, House, and Senate Reports, that the jurisdiction initially vested in the district court was "completely delegated to the bankruptcy court....The bankruptcy court is thus given pervasive jurisdiction over all proceedings arising in or relating to bankruptcy cases. In addition, the bankruptcy court is given exclusive jurisdiction of the property of the estate in a case under title 11." 124 Cong. Rec. S17,424 (daily ed., October 6, 1978); 124 Cong. Rec. H11,107-11,108 (daily ed., September 28, 1978). (Emphasis supplied.)[12] Congress

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Commentators have remarked upon the legislative rationale for Section 1471(c). Judge Conrad Cyr, in 1978, while the Reform Act was incubating in Congress, wrote that "it has become an increasingly intolerable inefficiency to permit the continued adulteration of bankruptcy court jurisdiction in deference to overcrowded state and federal courts of general jurisdiction." Cyr, "Structuring a New Bankruptcy Court: A Comparative Analysis," 52 AM. BANK. L. J. 171, 173 and n. 1 (1978). (Emphasis in original omitted in part.) He did not foresee any lessening of this problem: "The federal district courts determine many of the more important and prominent issues of our time. There seems little likelihood that either the volume, scope or importance of the general jurisdiction of the federal district courts will be restricted appreciably in the foreseeable future. The prominence and importance universally attributed to much of the litigation overcrowding the dockets of the federal district courts cannot be compared to the much less glamorous gruel of the bankruptcy court. It seems all too predictable that the time and attention of the district judge of the bankruptcy division would soon be diverted to nonbankruptcy cases to such an extent that bankruptcy litigation would become a distinctly secondary concern. The unremitting demands of the enormous volume of large and small insolvency cases would then require reference by the district judge of the bankruptcy division to magistrates or special masters appointed to hear and report. It is very likely that it would not be long after the establishment of such a system that we would have come full circle--back to the referee system, with the probable additional disadvantage that the future 'referees' would be generalists, rather than specialists." Id. at 148-149. "[A]vailable empirical data strongly suggest that neither the opportunity nor the commitment required to develop or maintain expertise in bankruptcy law and practice is likely to exist on the part of most of the otherwise overburdened federal judges." Id. at 157. Others have observed that "[t]he Act's jurisdictional scheme caused additional delay whenever a bankruptcy court could not

believed there was no time, expertise, or inclination in the district courts, and therefore, vested jurisdiction "completely" and "exclusively" in the bankruptcy courts.[13]

2. Case Law

The Supreme Court and several district courts, recognizing the import of this legislative history, and in more contemplative times, have read Sections 1471(a), 1471(b), and 1471(c) to mean that district courts have the shadow but not the substance of power, all of which must be exercised by the bankruptcy courts.

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take jurisdiction of an issue but had to await its resolution in a nonbankruptcy forum, where proceedings are usually slower and more likely to be postponed. Thus, commentators calling for bankruptcy reform often complained that state courts or federal district courts sitting at law or in equity heard far too many bankruptcy matters because 'the same results could be more efficiently and speedily reached in one bankruptcy forum'". Note, "Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings," 59 TEX. L. REV. 325, 329 (1981) (emphasis supplied), citing Drake, "The Judges' Bankruptcy Bill and the Commission's Bill: A Question of Access to the Judicial Process," 26 MERCER L. REV. 1009, 1011 (1975).

13 The Senate version, Section 216 of S. 2266, which would have amended old 28 U.S.C. Section 1334 and added a new paragraph (d)(1), said that the bankruptcy court "may exercise" the jurisdiction given to the district court. The Senate Report, however, emphasized that "[t]he use of the term 'may' in this section is not intended to imply that the district court has any discretion whatsoever in withholding bankruptcy cases or civil proceedings arising under title 11 or arising under or related to a case under title 11 from the bankruptcy court." SEN. REP. No. 95-989, supra at 154. To remove any doubt however, Section 1471(c), as enacted, was changed to read the bankruptcy court "shall exercise" the jurisdiction given to the district court. Similarly, Pub. L. No. 95-598, as passed, amends title 28 by adding a new Chapter 6. Section 151 of Chapter 6 creates and composes the new bankruptcy courts which are to be "adjuncts" of the district courts. Section 151(3) provides for the designation and assignment of judges from circuit and district courts to sit on the new bankruptcy courts. See generally, Kennedy, "The Bankruptcy Court Under The New Bankruptcy Law: Its Structure and Jurisdiction," 55 AM. BANK. L. J. 63, 66-79 (1981). This provision might be surplusage if these judges, who are otherwise assignable throughout the federal system, could exercise jurisdiction through the district court.

The plurality in Marathon, for example, gave this construction to the statute, noting that Sections 1471(a) and 1471(b) are a "facade" because "the bankruptcy courts exercise 'all of the jurisdiction' conferred by the act on the district courts." Marathon, supra at 2879. (Emphasis in original.)[14] Indeed, this view is necessary to their holding "that §241(a)...has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct." Id. at 2880. The concurring justices were likewise "of the opinion that the extent of review by Art. III courts provided on appeal from a decision of the Bankruptcy Court in a case such as Northern's does not save the grant of authority to the latter...All matters of fact and law in whatever domains of the law to which the parties' dispute may lead are to be resolved by the Bankruptcy Court in the first instance, with only traditional appellate review apparently contemplated by Art. III courts. Acting in this manner the Bankruptcy Court is not an 'adjunct' of either the District Court or the Court of Appeals." Id. at 2882.

Marathon Pipeline Company v. Northern Pipeline Construction Company, CCH FED. BANK. L. REP. ¶68,268 (D. Minn., July 24, 1981), the district court opinion, also noted the two step

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14 The "two step process" was a legislative "legerdemain," "circumlocution," "stratagem," or "sleight of hand" to sidestep constitutional problems. See, e.g., 1 COLLIER ON BANKRUPTCY ¶2.01[1][c], at 3-36--3-37 (15th ed. 1982); id. ¶3.01[e], at 3-44; Kennedy, "The Bankruptcy Court Under The New Bankruptcy Law: Its Structure and Jurisdiction," 55 AM. BANK. L. J. 63, 80-81 (1981); Lieb, "Jurisdiction and Venue in Bankruptcy Litigation," 1982 ANN. SURV. BANK. L. 69, 76, 78.

process of Section 1471, and observed that "the ultimate repository of this jurisdiction is not the federal district court. 28 U.S.C. §1471(c) assigns the jurisdiction granted to the district courts by subsections (a) and (b) to the bankruptcy courts. This assignment or transfer of jurisdiction from the district courts to the bankruptcy courts is mandatory, as the bankruptcy courts 'shall exercise all the jurisdiction [so] conferred.' Thus, the statutory scheme is constructed in such a manner as to remove with one hand what was just previously bestowed by the other." Id. at 79,491-79,492.

In Chamberlain Livestock Auction, Inc. v. Aberdeen Production Credit Association, 22 B.R. 750 (D. S.D. 1982), the bankruptcy court abstained from hearing a suit for conversion and transferred the proceeding to the district court. The district court dismissed the proceeding for want of diversity jurisdiction. Plaintiffs asked the district court to vacate the order of dismissal, arguing that it had jurisdiction under Section 1471(b). The district court rejected this argument, stating that it "ignores the intent of Congress when it passed the Bankruptcy Code in 1978. Subsections (a) and (b) of 28 U.S.C. §1471 were designed by Congress to ensure the constitutionality of the grant of expansive jurisdiction to bankruptcy courts by making them adjuncts of the district courts...The intent of Congress...was to channel the bankruptcy proceedings to the bankruptcy courts. There appears no indication that Congress intended that the district courts have expanded jurisdiction to hear new kinds of proceedings." Id. at 751. The motion to vacate the order of dismissal was denied.

In In re Related Asbestos Cases, 23 B.R. 523 (N.D. Cal. 1982), plaintiffs had brought products liability actions against several asbestos manufacturers in district court. Two manufacturers, Unarco and Johns-Manville, filed petitions under Chapter 11 of the Bankruptcy Code. The automatic stay, found at 11 U.S.C Section 362(a), barred continuation of the suits against Unarco and Johns-Manville, but it was questioned whether the stay protected the nondebtor codefendants. These codefendants argued that the district court was without jurisdiction to construe the scope of Section 362(a) and that plaintiffs must obtain relief from the stay from the bankruptcy courts. The codefendants, in support of this position, cited In re Coleman American Companies, 8 B.R. 384 (Bky. D. Kan. 1981), which held that a creditor must obtain relief from the stay in the bankruptcy court where the case is commenced. The district judge in Related Asbestos Cases distinguished Coleman, noting that he was construing the scope of the stay, but agreed that he had no power to grant relief from the stay: "[T]he original bankruptcy courts alone would have exclusive power to lift an actual stay under section 362. A contrary conclusion would contravene the intention of Congress to centralize litigation concerning the bankrupt's affairs in a single forum." In re Related Asbestos Cases, supra at 526.

In In re Wolf, CCH BANK. L. REP. ¶67,947 (D. Mass., February 9, 1981) creditors had filed a petition for involuntary bankruptcy against a debtor under 11 U.S.C. Section 303. The debtor moved to dismiss or abstain in the bankruptcy court. While this motion was pending, debtor filed an action in district court, seeking a declaratory judgment that the bankruptcy court should

dismiss the involuntary petition. The creditors sought dismissal of the suit in district court on the ground that it lacked subject matter jurisdiction. The district court agreed "that the present posture of the...dispute does not permit the exercise of either appellate or original jurisdiction. Appellate jurisdiction does not exist because the bankruptcy court has not yet issued an order on the debtor's motion to dismiss...Until an order is issued...there is nothing for this court to review. Original jurisdiction is inappropriate because a party may not use an action for declaratory relief as a substitute for appeal. The debtor may not by pass [sic] the appellate procedures set out in the 1978 Reform Act by bringing a declaratory motion. The debtor's only recourse, therefore, was to await the decision of the bankruptcy court on his motion to dismiss." Id. at 78,879-78,880. Wolf thus implies that district courts have appellate but not original jurisdiction under the Reform Act.

In In re William O. Petrusch, Jr. d/b/a B & L Distribution Center, 8 B.C.D. 180 (N.D.N.Y. 1981), a bankruptcy court enjoined a union from picketing a business which had filed a petition under Chapter 13 of the Bankruptcy Code. The union, claiming that the injunction violated the Norris-LaGuardia Act, sought a stay from the district court, pending appeal. The debtor argued that the district court "has no authority to overturn... the Bankruptcy Court's injunction since, in matters of bankruptcy, the district courts and the bankruptcy courts have concurrent jurisdiction under 28 U.S.C. §1471." Id. at 180 n. 1. The district court rejected this argument, noting that it was acting in an appellate not a trial capacity. Id. See also, Lieb,

"Jurisdiction and Venue in Bankruptcy Litigation," 1982 ANN. SURV. BANK. L. 69, 101-102. Like Wolf, Petrusch implies that district courts have appellate but not original jurisdiction under the Reform Act.

Bankruptcy court decisions, pre- and post- Marathon, have concurred with this construction of Section 1471. See, e.g., In re Motion to Dismiss: Constitutionality of Jurisdiction of the Bankruptcy Court, supra at 338,345; In the Matter of the Schear Realty & Investment Co., Inc., 9 B.C.D. 1210, 1215 (Bky. S.D. Ohio 1982); In the Matter of Century Entertainment Corp., 20 B.R. 126, 128 (Bky. S.D. Ohio 1982); In re Jorges Carpet Mills, Inc., Adv. Pro. No. 1-82-0638 (slip opinion at 8-10)(Bky. E.D. Tenn., January 31, 1983). Other authorities are in accord. See, e.g., W. Norton and R.Lieb, RECONSTITUTING THE BANKRUPTCY COURT IN 1982: CONGRESSIONAL CONSTITUTIONAL OPTIONS 6-7, 13-14 (1982); Babitt, "The Bankruptcy Court, Its Judges, Their Jurisdiction and Powers, and Appeals, Under Title 11 of the 1978 Bankruptcy Reform Act: Transition and Beyond," 1979 ANN. SURV. BANK. L. 89, 92, 95; Clarkson, "A Brief Overview of the Congressional Debate on the Bankruptcy Court System," 1979 ANN. SURV. BANK. L. 63, 69; Finley, "Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court," 1982 ANN. SURV. BANK. L. 1, 6, 22-23; Krattenmaker, "Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional," 70 GEO. L. J. 297, 308 (1981); "Brief for the United States of America in Support of the Constitutionality of the Provisions of 28 U.S.C. §1471 Vesting in the United States District Court and Delegating to Adjunct Bankruptcy Courts

Jurisdiction Over All Bankruptcy-Related Controversies," reprinted in 56 AM. BANK. L. J. 97, 99, 108 (1982). But cf. Kennedy, "The Bankruptcy Court Under The New Bankruptcy Law: Its Structure and Jurisdiction," 55 AM. BANK. L. J. 63, 77 (1981).[15]

The rule is inconsistent with the language, history, and purpose of Section 1471(c). District courts, before December 24, have disclaimed original jurisdiction under Section 1471. Plaintiff, to counter this history and these cases, argues that the jurisdiction of the district court, like a "springing use," was "revived" when the stay expired. This argument, however, in effect, amends the statute and invents a jurisdiction which the district court never possessed.[16]

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15 Three district court opinions have disagreed with this construction of Section 1471. In Moore v. White Motor Corporation, 24 B.R. 200 (N.D. Ohio 1982), Judge Aldrich opines that district courts may exercise trial jurisdiction under Section 1471. She admits, however, that the "issue is not specifically before this Court at this juncture." Id. at 203. (Indeed, she asserts jurisdiction under Section 1334 as an appellate court. Id. at 201.) In In the Matter of Northland Point Partners, Adv. Nos. 82-2277-W and 82-2332-W (order)(E.D. Mich., January 7, 1983), Judge DeMascio remarks that "it appears to us that the power conferred by 28 U.S.C. §1471(a) and (b) was arguably not affected by the Marathon decision. Id. at 3. Although unclear, this conclusion may flow from a belief that Section 241(a) is severable. Id. In any event, the history and case law dealing with Section 1471 are not discussed. In In re Braniff Airways, Incorporated, Misc. No. 4-221-E (N.D. Tex., January 20, 1983), Judge Mahon, relying upon the severability of Section 241(a), finds that district courts have trial jurisdiction under Section 1471. The history and case law dealing with Section 1471 are not discussed.

16 Plaintiff argues that Section 241(a) is severable and that the death of Section 1471(c) gives life to Sections 1471(a) and 1471(b). The rules of severance, however, do not allow a "springing use," especially in the face of contrary legislative intent or inadequate statutory remainder.

Severance is impermissible where it is "evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not" or where the balance of a statute is not "fully operative as a law."

IV. TRANSITION STATUTES

Plaintiff points to the transition statutes as an alternate basis for jurisdiction over bankruptcy matters in the district court. It argues that Section 404(a) continues the court of bankruptcy of former law, that this court of bankruptcy was the district court, and therefore the district court may act in bankruptcy matters. Plaintiff further argues that Section 405(a)(2) confirms this view. Section 405(a)(2) provides: "Except as provided in subsection (c) of this section, any proceeding in a court of bankruptcy in a case under title 11 of the United States Code that is not before the United States bankruptcy judge shall be before the judge of the court of bankruptcy for the district in which such case is pending." The

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Buckley v. Valeo, 424 U.S. 1, 108 (1976). Even where a statute contains a severability clause, it will not apply if the effect "would be to create a program quite different from the one the legislature actually adopted." Sloan v. Lemon, 413 U.S. 825, 834 (1973).

These tests underline the nonseverability of Section 241(a). The plurality and concurrence were concerned with splitting jurisdiction between forums. Thus, footnote 40 emphasizes that "Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction," and that "one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdiction disputes." For this reason, it would not be "Congress' choice...to have this case 'routed to the United States district court of which the bankruptcy court is an adjunct.'" Marathon, supra at 2880 n. 40. (Emphasis supplied.)

"judge of the court of bankruptcy" is the district judge, it is said, and he may hear bankruptcy matters when the bankruptcy judge may not. These arguments are unpersuasive, however, for several reasons.[17]

This reading of legislative intent is consistent with the statutory scheme. Jurisdiction over cases and proceedings is taken from the district courts and given to the bankruptcy courts. Jurisdiction over property is given to the bankruptcy courts. Removal jurisdiction and the option to remand are given to the bankruptcy courts. Venue, provisional remedies, jury trials, and the power to act in "equity, law, and admiralty" are tied to the bankruptcy courts.

In short, the indivisibility of jurisdiction conferred on the bankruptcy court is the reason for nonseverance. Severance of Section 1471(c) from Section 241(a), far from working a "revival" of Sections 1471(a) and 1471(b), offends legislative intent, and leaves a statutory remainder which is not "fully operative as a law."

The dissent, in the opinion of Justice White, argued that the Court should sever the jurisdiction of the bankruptcy court over Marathon-type proceedings. This, in its view, "would remove from the jurisdiction of the bankruptcy judge only a tiny fraction of the cases he is now empowered to adjudicate and would not otherwise limit his jurisdiction." Marathon, supra at 2884 (Justice White, dissenting opinion). The dissent did not argue, however, that if the entire jurisdiction of the bankruptcy court were stricken, the jurisdiction of the district court nevertheless could be severed and revived. Put differently, the dissent argued that legislative intent would permit severance of Marathon-type proceedings. It did not argue that legislative intent would allow severance of the bankruptcy court and its replacement by the district court.

17

Plaintiff has not argued that Marathon worked a "revival," via Section 404(a), of jurisdiction under the old Bankruptcy Act. The revival argument, in any event, has been soundly discredited. See, e.g., H.R. REP. No. 97-807,97th Cong., 2d Sess. 88-107 (1982).

First, the arguments beg the question of jurisdiction. Assuming the district judge or district court may sit as the court of bankruptcy continued under Section 404(a), what is the source of its jurisdiction? The answer is in Section 405(b) which makes Section 241(a) applicable to the courts of bankruptcy during transition. Hence, the source of jurisdiction for the district judge or district court, qua district court or court of bankruptcy, is the same, viz., Section 241(a). As noted above, however, Section 241(a) is nonseverable and was stricken by Marathon, leaving no jurisidiction for the district judge or district court, acting in any capacity, to exercise. Indeed, Marathon involved a transition case and its ruling applied to the transition statutes. See, In re Motion to Dismiss: Constitutionality of Jurisdiction of the Bankruptcy Court, supra at 345-346.[18]

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The status of the district judge or district court as a court of bankruptcy under Section 404(a), as noted in the text, adds nothing to the debate over jurisdiction under the Reform Act.

The court of bankruptcy during transition is a forum to deal with cases still pending under and governed by the former Bankruptcy Act. See, Pub. L. No. 95-595, Section 403(a), 92 Stat. 2683 (1978). Cf. Central Trust Co. v. Creditors' Committee, 454 U.S. 354 (1982).

The court of bankruptcy, as such, serves no purpose under the Reform Act. It is continued during transition, but "[e]ach of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy." Read literally, Section 404(a) says that the court of bankruptcy is at once the district court and a separate department of the district court. This confusion is compounded by Section 405(b) which grants the court of bankruptcy jurisdiction under Section 241(a) where the bankruptcy and district courts are functionally distinct entities. This view is reinforced by Section 405(a)(2) and 405(c) which, as discussed below, with narrow exceptions, confine the district judges and district court to an appellate role.

In short, the bankruptcy system, under the transition statutes, is the analogue of the court structure and jurisdiction post-transition. This is evidenced by the many parallels between

Moreover, assuming that Section 241(a) be severable, Section 405(a)(1), like Section 1471(c), mandates the reference of all cases and proceedings in bankruptcy to the bankruptcy judge and thereby prevents the exercise of jurisdiction by the district judge. See, e.g., H.R. REP. No. 95-595, supra at 460; 1 COLLIER ON BANKRUPTCY ¶7.05 [1][a], at 7-55--7-59 (15th ed. 1982). Cf. In re Jorges Carpet Mills, Inc., Adv. Pro. No. 1-82-0638 (slip opinion at 11-12)(E.D. Tenn., January 31, 1982).

Section 405(a)(2), contrary to the contention of plaintiff, does not alter this mandate if read with Sections 405(a)(1) and 405(c). Sections 405(a)(1)(A), (B), and (C) forbid bankruptcy judges from hearing motions to enjoin another court, certain criminal contempts, and appeals from a bankruptcy judge. Sections 405(c)(1) and (2) make Section 1334 operative during transition and constitute the district court as an appellate tribunal.

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titles II and IV of the Reform Act, as well as Pub. L. No. 95-598, Section 406, 92 Stat. 2686 (1978) which requires the Administrative Office of United States Courts to make "continuing studies and surveys of conditions in the judicial districts to determine," among other things, "the number of bankruptcy judges of the United States bankruptcy courts established under Section 201 of this Act that will be needed after March 31, 1984, to provide for the expeditious and effective administration of justice." These prognostications would be inaccurate unless the transition system, from which measurements are made, will be substantially the same as the post-transition system. Indeed, the House Report notes that the transition courts will operate "enough like the proposed new court system so that the measurement process of case-load and judicial time requirements will be accurate." H.R. REP. No. 95-595, supra at 459. See also, id. at 460; 1 COLLIER ON BANKRUPTCY ¶2.01[d], at 2-30 (15th ed. 1982); id. ¶3.01 [1][a], at 3-10; id. ¶ 7.04[1], at 7-25--7-27; id. ¶7.04[5], at 7-49--7-50; id. ¶ 7.05[1] 7-55; In the Matter of Glover, Inc., No. 82-1722 (slip opinion at 6)(10th Cir. 1983); In re Callister, 673 F.2d 305, 306 (10th Cir. 1982); In re Shannon 670 F.2d 904, 906 (10th Cir. 1982).

Section 405(a)(2) was designed to mesh with Sections 405(a)(1) and 405(c). Section 405(a)(2) provides that where a proceeding is not before a bankruptcy judge, meaning proceedings enumerated in Section 405(a)(1)(A), (B), and (C), such as certain criminal contempts, they may be heard by the district judge. See, e.g., 1 COLLIER ON BANKRUPTCY, supra ¶7.05[1][b], at 7-59--7-61; W. Norton and R. Lieb, THE AFTERMATH OF NORTHERN PIPELINE: BANKRUPTCY JURISDICTION UNDER LOCAL COURT RULE 25 (1983); Kennedy "The Bankruptcy Court Under the New Bankruptcy Law: Its Structure and Jurisdiction," supra at 69 n. 24, 74 n. 49, 89 n. 114. Section 405(a)(2) is made subject to Section 405(c) to emphasize that the district judge shall not function simultaneously in a trial and appellate capacity.

Plaintiff's construction ignores the harmonious relation of Sections 405(a)(1), 405(a)(2), and 405(c). It would broaden the matters triable before the district judge beyond those enumerated in Sections 405(a)(1)(A), (B), and (C), in derogation of the mandatory reference of Section 405(a)(1), in contravention of the proviso which precludes the district judge from wearing trial and appellate hats in Section 405(a)(2), and in opposition to the legislative intent earlier described.[19]

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19 Section 405(a)(2) is not broad enough, in any event, to validate the rule, since at most it permits the district judge to hear proceedings not cases under title 11.

V. CONCLUSION

The rule does not confer power to hear this proceeding because it rests upon faulty jurisdiction. If the rule dies under law, equity cannot resuscitate it. Equity so employed would become inequity to those who improvidently--or involuntarily--relied. The complaint must be dismissed.[20]

Recognizing, however, that the law in this case may be, as Justice Holmes suggested, "nothing more" than a "prophe[cy] of what the [appellate] courts will do in fact," O. Holmes THE PATH OF THE LAW (1897), the judgment dismissing the complaint is stayed and certified to the district court for review under paragraphs (d)(2) and (e)(2)(A)(ii) of the rule.

DATED this 7th day of February, 1983.

Ralph R. Mabey
United States Bankruptcy Judge

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[20] Because of the disposition of this proceeding on jurisdictional grounds, it is unnecessary to determine whether the district court has authority to promulgate the rule, and if so, whether the rule has been issued consistent with that authority. Nor is it necessary to decide whether, under the guidelines of Marathon, or within other relevant restraints, the rule properly delegates power from the district court to bankruptcy judges as special masters.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re KENT D. RICHARDSON, and F. NADINE RICHARDSON, Debtors.	Bankruptcy Case No. 82C-00736
DUANE H. GILLMAN, Trustee of the estate of KENT D. and F. NADINE RICHARDSON, Plaintiff. -vs- PRESTON FAMILY INVESTMENT COMPANY, and FIRST INTERSTATE BANK OF UTAH, Defendants.	Civil Proceeding No. 82PC-0746 MEMORANDUM OPINION ON SUBJECT MATTER JURISDICTION

Appearances: Duane H. Gillman, Boulden & Gillman, Salt Lake City, Utah, for plaintiff; Stephen T. Preston, Salt Lake City, Utah, for defendant Preston Family Investment Company; Roy A. Williams, Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah, for defendant First Interstate Bank of Utah.

Preston Family Investment Company, defendant in a civil proceeding brought by a trustee in bankruptcy, arising under title 11, United States Code, and commenced before June 28, 1982, requests dismissal for lack of subject matter jurisdiction. The motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND

Debtors filed a joint petition for relief under Chapter 7 on March 25, 1982. On June 15, 1982, the trustee of the debtors' estates filed this action to avoid a transfer of property under 11 U.S.C. §§ 544(a)(3), 544(b), and 548(a)(2). The trustee then filed a motion for summary judgment which was granted in part and denied in part by an order entered on October 2, 1982. It was held, as a matter of law, that the trustee could not avoid the transfer under Section 544(a)(3), that a summary judgment on the trustee's cause of action under Section 544(b) was not then appropriate, and that the trustee was entitled to a partial summary judgment on his cause of action under Section 548(a)(2). Gillman v. Preston Family Investment Co. (In re Richardson), 23 B.R. 434 (D. Utah 1982). Thus, the trustee's causes of action under Sections 544(b) and 548(a)(2) were left for trial, which was set for January 14, 1983. At trial, defendant Preston Family Investment Co. moved to dismiss the trustee's complaint for lack of subject matter jurisdiction.[1] In support of its motion, Preston relies on Northern Pipeline Construction Co. v. Marathon Pipe Line Co., _____ U.S. _____, 102 S. Ct. 2858 (June 28, 1982) (hereinafter, Marathon).

Marathon holds that the grant of subject matter jurisdiction to the bankruptcy courts in Section 241(a) of the Bankruptcy

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1 See Rule 712 Bankr. R. P. and Rule 12(b)(1) and (h)(3) Fed. R. Civ. P.

Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2668 (codified at 28 U.S.C. §§ 1471-1482), violates Article III of the Constitution of the United States. Marathon also holds Section 241(a) invalid in its entirety. The Court refused to sever any constitutional portions of the jurisdictional grant from those portions which are not constitutional.[2]

The Supreme Court's judgment in Marathon did not take effect until December 24, 1982. See page 7, below. On December 24, the United States District Court for the District of Utah adopted a rule which became effective December 25. That rule applies "to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979." Section (h). The trustee's action falls within this provision. Sections (c)(1) and (h) of the rule refer this proceeding to this bankruptcy judge.

The trustee argues that either this court or the United States district court for this district has subject matter jurisdiction of this action. First, the trustee argues, this court retains jurisdiction under Section 241(a) of the Bankruptcy Reform Act. This action was filed on June 15, 1982, before the date of the Marathon decision and before the Marathon judgment became effective. In the trustee's view, because the Supreme

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2 For a thorough discussion of the holding of Marathon, see In re Color Craft Press, Ltd., _____ B.R. _____, Bankr. No. 81M-03184, Civ. Pro. No. 82PM-0974, slip op. (D. Utah Feb. 7, 1983). I concur completely in the views expressed In re Color Craft Press and adopt that opinion as a part of this opinion.

Court ruled that its holding in Marathon would apply only prospectively, this court retains subject matter jurisdiction under Section 241(a). Alternatively, the trustee argues that this court retains jurisdiction under 11 U.S.C. § 105 and Section 404(a) of the Bankruptcy Reform Act of 1978. The trustee's final argument is that the United States district court for this district derives jurisdiction from 28 U.S.C. § 1331 and that the rule adopted in this district made a valid reference to this bankruptcy judge of the trial of this action. These arguments are analyzed below.

THIS COURT DOES NOT RETAIN SUBJECT MATTER JURISDICTION OF THIS ACTION UNDER THE "PROSPECTIVE ONLY" HOLDING OF MARATHON

"[O]ur decision today," the Court said in Marathon, "shall apply only prospectively." 102 S. Ct. at 2880. Appended to this sentence is footnote 41, which cites portions of three cases: Buckley v. Valeo, 424 U.S., at 142; Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 376-377 (1940); Insurance Corp. v. Compagnie des Bauxites, _____ U.S. _____, _____, n. 9; 102 S. Ct. 2099, 2104 n. 9 (1982). The Court's intention is illuminated, not only by the authorities cited in footnote 41, but by the context in which its "prospective only" holding was made.

Before reaching the issue of the possible retroactive application of its decision, the Court "concluded that the broad grant of jurisdiction to the bankruptcy courts contained in § 241(a) is unconstitutional." 102 S. Ct. at 2880. Then, the Court asked "whether [its] holding should be applied retroactively to the effective date of the Act," October 1, 1979. Id. The Court turned its attention to Marathon's effect on actions taken pursuant to the jurisdictional grant of Section 241(a) between October 1, 1979 and June 28, 1982, the date of the Marathon opinion.

Analysis of the retroactivity question began with a review of "the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question 'decid[ed] an issue of first impression whose resolution was not clearly foreshadowed' by earlier cases, (citation omitted); second, 'whether retrospective operation will further or retard [the] operation' of the holding in question (citation omitted); and third, whether retroactive application 'could produce substantial inequitable results' in individual cases (citation omitted)." 102 S. Ct. at 2880 (citing Chevron Oil v. Huson, 404 U.S. 97, 106-107 (1971)). Next, the Court found that "in the present case, all of these considerations militate against the retroactive application of our holding today. It is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an unprecedented question of interpretation of Art. III. It is

equally plain that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." Id. The Court's reference to "litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts" leaves room for speculation. Did the Court mean parties who had secured judgments or orders by June 28, 1982? Did the Court refer to parties to matters filed by June 28 who had not yet obtained dispositive orders or judgments? Did the Court intend to include debtors and petitioning creditors who filed bankruptcy petitions before June 28 as well as parties to lawsuits, no matter when filed, which might arise within the penumbrae of pre-June 28 bankruptcy cases?[3] A convincing answer to these questions has not yet been given.

After holding "that our decision today shall apply only prospectively," the Court affirmed the judgment of the lower court. Then, the Court stayed its judgment until October 4, 1982. In the Court's view, a limited stay would "afford Congress an opportunity to reconstitute the bankruptcy courts or adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 102 S. Ct. at 2880.

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[3] As will be seen below, because of the stay of the Marathon judgment until December 24, references here and elsewhere to June 28 are, in effect, equivalent to references to December 24.

Because the Court stayed its judgment until October 4, its holding on retroactivity is fully applicable to the period between June 28, 1982 and October 4, 1982. And because the Court later extended the stay until December 24, 1982,[4] the Court's holding on retroactivity governs the period between October 4, 1982 and December 24, 1982. In other words, because of the stay until after December 24, 1982, bankruptcy cases and civil proceedings filed before June 28, 1982 stand on equal jurisdictional footing with those filed after June 28, but before the stay expired on December 24.

The Court's stay of its judgment in Marathon is a significant key to the meaning of its holding on retroactivity. Logically, the jurisdiction of the bankruptcy courts after December 24 to act in cases and proceedings filed through December 24 is the same as the jurisdiction of the bankruptcy courts would have been after June 28 to act in cases and proceedings filed through June 28 had there been no stay. Thus, the Court's view of what would have occurred after June 28 absent a stay is of prime importance.

According to the Court, absent a stay of its Marathon judgment, the interim administration of the bankruptcy laws would have been impaired. 102 S. Ct. at 2880. While it may be that the impairment the Court had in mind was limited to the absence of subject matter jurisdiction to act in bankruptcy cases filed

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4 See United States v. Security Industrial Bank, _____ U.S. _____, _____ n. 5; 103 S. Ct. 407, 410 n. 5 (1982).

after June 28 and in lawsuits connected with those cases, the Court did not qualify its statement. In any event, if the Court's "prospective only" holding permitted the exercise of Section 241(a) jurisdiction after June 28 in bankruptcy cases filed before June 28 and in connected lawsuits, it would have been unnecessary, at least for those bankruptcy cases and lawsuits, for the Court to stay its judgment; the Court could have entered its judgment on June 28 and in all filed bankruptcy cases and in connected lawsuits, the bankruptcy courts could have continued to exercise Section 241(a) jurisdiction. Thus, the "prospective only" holding may relate only to orders and judgments which had become final when the Court's judgment in Marathon went into effect. This inference is supported by the cases cited in Marathon footnote 41.

In Buckley v. Valeo, supra, the Court held that some of the powers granted by Congress to the Federal Election Commission could not constitutionally be exercised by Commission members not appointed by the President. At page 142, the citation appearing in footnote 41 in Marathon, the Court said

> It is also our view that the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date, including its administration of those provisions, upheld today, authorizing public financing of federal elections. The past acts of the Commission are therefore accorded de facto validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been

> elected in accordance with an unconstitutional apportionment plan.

Id. (emphasis supplied).

If the Marathon court meant, by its "prospective only" holding, the same thing said in Buckley, "actions and determinations to this date" and "past acts," orders and judgments entered between October 1, 1979 and December 24, 1982, are validated. Buckley is not authority for the exercise of jurisdiction after December 24.

In Chicot County Drainage District v. Baxter State Bank, supra, a federal district court, acting pursuant to a jurisdictional grant in the 1934 Act of Congress providing for municipal debt readjustments,[5] confirmed a plan of readjustment for the Chicot County Drainage District which affected the rights of bondholders. The order confirming the plan was entered in March of 1936. About two months later, on May 25, 1936, the Supreme Court held that the statute under which the district court had acted was unconstitutional. Ashton v. Cameron County Water Improvement District, 298 U.S. 513 (1936).[6]

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5 Act of May 24, 1934, 48 Stat. 798.

6 After the May 25, 1936 ruling there were pending in the circuit courts several appeals from orders entered under the Act Ashton held unconstitutional. The Supreme Court did not make its ruling prospective and did not stay its judgment. The circuit courts had no choice but to apply the Ashton decision to the cases before them.

In cases where an objection to the constitutionality of the Act had been made before the Ashton decision was rendered and (Cont. Page 10)

the rulings on those objections were on appeal after the Ashton decision, the circuit courts followed Ashton and required dismissal of the proceedings. Adams v. City of Sarasota, 83 F. 2d 1005 (5th Cir. June 6, 1936) (The city filed a petition under the Act, certain bondholders intervened in opposition to the petition and argued the unconsitutionality of the Act, and the lower court ruled against the bondholders. The Fifth Circuit said, "On the authority of Ashton . . . , the judgment is reversed and the case remanded, with instructions to dismiss the proceeding."); Schaller v. Board of Supervisors, 83 F. 2d 1016 (8th Cir. June 26, 1936) (A drainage district filed a petition under the Act, the lower court approved a plan of readjustment, a bondholder moved to dismiss the petition on the ground that the Act was unconstitutional, and the lower court denied the motion. The Eighth Circuit said, "Subsequent to the ruling on the motion to dismiss . . . the Supreme Court of the United States in the case of C.L. Ashton . . . has held that section 80 of the Bankruptcy Act as amended (11 U.S.C.A. §303) was invalid under the Constitution. The holding is directly applicable here and requires us to rule that the motion to dismiss should have been sustained by the trial court."). Id. at 1017.

Even in cases on appeal when Ashton was decided in which no objection to jurisdiction had been raised in the lower court, at least as far as can be seen from the published opinions, the appellate courts applied Ashton to require dismissal of the pending bankruptcy cases. Covell v. Waterford Irrigation District, 86 F. 2d 22 (9th Cir. Oct. 19, 1936) cert. denied 300 U.S. 682 (1937). (An irrigation district filed a petition under the Act, the lower court approved a reorganization plan, and bondholders of the district appealed. The Ninth Circuit Court of Appeals ordered dismissal of the bankruptcy case: "During the pendency of this appeal the Supreme Court has held that the provisions of the Bankruptcy Act relied upon are unconstitutional . . . (citing Ashton). For that reason the order of the lower court must be reversed, and the case remanded to the District Court for further action consistent with this opinion."). In Bekins v. Merced Irrigation District 89 F. 2d 1002 (9th Cir. April 12, 1937), explained in In re Merced Irrigation District, 25 F. Supp. 981, 986-987 (S.D. Calif. 1939), an irrigation district filed a petition under the Act later held unconstitutional in Ashton. The district court confirmed a plan of readjustment and a dissatisfied group of investors appealed. Before the appeal was heard, the Supreme Court decided Ashton. The Ninth Circuit Court of Appeals ordered that "a decree be filed and entered reversing the decree of [the] District Court, and remanding the cause with instructions to dismiss the cause . . . ." 89 F. 2d 1002. (Cont. Page 11)

After the confirmation order became final, bondholders of the drainage district sued the district in a collateral proceeding to redeem their bonds. In defense, the drainage district pled the res judicata effect of the order of confirmation. The bondholders argued, and the district court and court of appeals held, that the order of confirmation was void because, after its entry, the Supreme Court had declared unconstitutional the statute authorizing the plan's confirmation. The theory of the lower courts was that "the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence no basis for the challenged decree." Chicot, supra at 374.

The Supreme Court, however, said that "such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications:"

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, --with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions

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These decisions were rendered in appeals from decisions made under the unconstitutional Act. The appeals were pending or perfected after Ashton. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940), arose under different circumstances. See discussion of Chicot in text.

> are among the most difficult of those which have engaged the attention of the courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

Id. (emphasis supplied). After making these observations, the Court found that with respect to the confirmation order, apart from the question of the effect of the later decision as to constitutionality, all the elements of the defense of res judicata were present.

Next, the Court asked whether the district court, because the statute under which it entered the order of confirmation was later declared unconstitutional, was without jurisdiction to entertain the readjustment proceeding and whether its order was therefore subject to collateral attack. In response, the Court gave the following answer at pages 376 to 377, the citations given in footnote 41 of Marathon:

> We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally.
>
> In the early case of M'Cormick v. Sullivant, 10 Wheat. 192, where it was contended that the decree of federal district court did not show that the parties to the proceedings were citizens of different States and hence that the suit was coram non judice and the decree

void, this Court said: "But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior Courts of the United States. They are all of limited jurisdiction; but they are not, on that account, inferior Courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities." Id., p. 199. See, also, Skillern's Executors v. May's Executors, 6 Cranch 267; Des Moines Navigation Co. v. Iowa Homestead Co., 123 U.S. 552, 557, 559; Dowell v. Applegate, 152 U.S. 327, 340; Evers v. Watson, 156 U.S. 527, 533; Cutler v. Huston, 158 U.S. 423, 430, 431. This rule applies equally to the decrees of the District Court sitting in bankruptcy, that is, purporting to act under a statute of Congress passed in the exercise of the bankruptcy power. The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action. Stoll v. Gottlieb, 305 U.S. 165, 171, 172.

Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. If the contention is one as to validity, the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application. In the present instance it is suggested that the situation of petitioner, Chicot County Drainage District, is different from that of the municipal district before the court in the Ashton case. Petitioner contends that it is not a political subdivision of the State of Arkansas but an agent of the property owners within the District. See Drainage District No. 7 of Poinsett County v. Hutchins, 184 Ark. 521; 42 S. W. 2d 996. (footnote omitted). We do not refer to that phase of the case as now determinative but

> merely as illustrating the sort of question which the District Court might have been called upon to resolve had the validity of the Act of Congress in the present application been raised. As the question of validity was one which had to be determined by a judicial decision, if determined at all, no reason appears why it should not be regarded as determinable by the District Court like any other question affecting its jurisdiction. There can be no doubt that if the question of the constitutionality of the statute had actually been raised and decided by the District Court in the proceeding to effect a plan of debt readjustment in accordance with the statute, that determination would have been final save as it was open to direct review upon appeal. Stoll v. Gottlieb, supra. (footnote omitted).

While some language in Chicot might support a broader holding, Chicot involved an attack on a final order and its holding rests on that fact. Chicot did not preserve proceedings which had not been disposed of by a final order. Thus, Chicot stands only for the proposition that orders which have become final prior to a decision of the Supreme Court invalidating the jurisdictional provisions under which the orders were entered are not open to collateral attack.

Like Buckley, Chicot confirms the validity of orders and judgments entered under the authority of Section 241(a) between October 1, 1979 and December 24, 1982 which have become final. Chicot is not authority for the proposition that after December 24, 1982, bankruptcy courts possess any vestige of subject matter jurisdiction.

In Insurance Corp. v. Compagnie des Bauxites, supra, the Court held that a federal district court, as a sanction for

disobedience of a discovery order seeking facts related to personal jurisdiction, could deem those facts established. In making its ruling, the Court distinguished subject matter jurisdiction from personal jurisdiction, and in so doing stressed the source and import of the subject matter jurisdiction of federal courts:

> The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties. (citations omitted).
>
> . . .
>
> Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Article III, §2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power. Apart from this Court, that power only exists "in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, §1.
>
> Subject matter jurisdiction, then, is an Article III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, (citation omitted), principles of estoppel do not apply, (citation omitted), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.
>
> Similarly, a court, including an appellate court, will raise lack of subject matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which

> requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 382 (1884).

102 S. Ct. at 2104. This paragraph is followed by footnote 9, cited in footnote 41 in Marathon:

> A party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictionl determinations -- both subject matter and personal. See Chicot County Drainage Dist. v. Bank., 308 U.S. 371 (1940); Stoll v. Gottlieb, 305 U.S. 165 (1938).

Footnote 9 adds nothing to Marathon except an explanation of Chicot. Insurance Corp., as a restatement of the law of subject matter jurisdiction, however, shows that reliance on consent as the sole basis for jurisdiction, or on estoppel, or on failure to object, is improper.[7] The only legitimate source of subject matter jurisdiction in the lower federal courts is an express statutory grant from Congress. It may not be derived from the Executive, from the Judiciary, or from litigants. If a federal court finds itself without jurisdiction, it must so declare.

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7 Under former law, the consent of a defendant sued by a trustee in bankruptcy was sufficient to confer federal subject matter jurisdiction, but only because a federal statute so provided. Bankruptcy Act of 1898, § 23b, former 11 U.S.C. § 46b. That statute has been repealed. Pub. L. No. 95-598, § 401(a), 92 Stat. 2682 (1978).

Taken together, the authorities cited in Marathon footnote 41 legitimize only those orders and judgments of bankruptcy courts entered pursuant to Section 241(a)'s jurisdictional grant which have become final, to which the principles of res judicata apply, and which were entered before December 24, 1982. In Marathon and in the cases cited in footnote 41, jurisdiction to act after December 24, 1982, does not "affirmatively appear" and for that reason must be denied.[8]

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"[T]he rule . . . is inflexible and without exception, which requires this court . . . to deny jurisdiction . . . in all cases where such jurisdiction does not affirmatively appear in the record." Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 382 (1884), cited in Insurance Corp., supra at 2104.

Accord, Still v. First Bank of Newton (In re Jorges Carpet Mills, Inc.), No. 1-80-02516, Adv. Proc. No. 1-82-0638, slip op. (Bkrtcy. E.D. Tenn. Jan. 31, 1983) ("On [December 25, 1982] it became the law of the United States that the bankruptcy courts as bankruptcy courts do not have jurisdiction to do anything in a case pending under the 1978 Act. The argument that the ruling in Northern applies only to cases filed after December 24, 1982, is unconvincing . . . In the Northern case, the Supreme Court said that its decision would be prospective only. In other words, the court held that its decision would not affect orders that were already final . . . Bankruptcy court orders that became final between the date of the Northern decision and the date it took effect were not affected by the lack of jurisdiction because the Northern order did not apply retroactively . . . Nothing in Northern reasonably leads to the conclusion that it affects jurisdiction only in cases and proceedings filed after it took effect . . . The Supreme Court delayed the effect of Northern to preserve jurisdiction not just for cases and proceedings not yet filed but also for cases and proceedings already pending . . . Furthermore, the cases cited by the Supreme Court dealt with the effect of a decision like Northern on orders that were final or actions that were taken without challenge before the decision . . . This court must conclude that beginning on December 24, 1982, the bankruptcy courts as bankruptcy courts ceased to have jurisdiction to make any orders in cases or proceedings under the 1978 Act.").

(Cont. Page 18)

In Walter E. Heller and Co. v. Matlock Trailer Corp., (In re Matlock Trailer Corp.), Bk. No. 382-02778, Adv. No. 382-0755, slip op. (M.D. Tenn. Jan. 26, 1983), the bankruptcy court for the Middle District of Tennessee ruled that it retained "§ 241(a) jurisdiction to adjudicate all bankruptcy cases filed prior to December 24, 1982, including all adversary proceedings and related matters to those cases, whenever filed." Id. at 2.

In reaching this conclusion, the court followed three lines of reasoning. First, citing Supreme Court decisions on the retroactive effect of rulings on criminal procedure, the court noted that "in the criminal area, the Court has often allowed cases to continue despite constitutional questions and infirmities concerning underlying issues . . . on the theory that justice is better served when cases begun in reliance on a particular constitutional interpretation are allowed to continue to completion." Id. at 10. Second, the court reasoned that any holding not permitting the continued exercise of jurisdiction in filed bankruptcy cases would not give "meaning and effect to the Court's concern for fairness, equity and the prevention of hardship which motivated their decision to apply [Marathon] prospectively," and would "create an inequitable travesty. Litigants would be treated differently based solely on the date a particular proceeding was completed." Id. at 11. The court found nothing in Marathon "to indicate that the Court intended to promote a 'race to judgment' so that parties who received judgments prior to December 24 would be protected and those whose cases could not be accomodated by the court's schedule or were taken under advisement would be prejudiced." Id. Third, the court found that, given the Supreme Court's concern for injustice and hardship, a ruling denying jurisdiction in cases filed before December 24 and connected proceedings would be inconsistent, for "the administration of all bankruptcy cases would come to a halt . . . , [bankruptcy would be reduced] to a meaningless concept . . . , [and] bankruptcy cases pending before this court would disappear with consequent unimaginable waste and prejudice to the parties involved." Id. at 13.

The Supreme Court, one week before its decision in Marathon, concluded that "retroactivity must be rethought," and went on to analyze the issues involved in giving retroactive effect to one of its criminal procedure decisions. United States v. Johnson, _____ U.S. _____, 102 S. Ct. 2579, 2586 (June 21, 1982). Johnson specifically notes the distinction between civil and criminal retroactivity: "all questions of civil retroactivity continue to be governed by the standard enunciated in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971)." 102 S. Ct. at 2594-2595. Significantly, Marathon did not cite Johnson or any other opinion on the retroactivity

(Cont. Page 19)

THIS COURT DOES NOT RECEIVE SUBJECT MATTER JURISDICTION OF THIS ACTION FROM 11 U.S.C. § 105(a) AND SECTION 404(a) OF THE BANKRUPTCY REFORM ACT

The trustee argues that the bankruptcy courts derive subject matter jurisdiction over actions arising under title 11, such as this action, from the combination of two provisions of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549:

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of criminal procedure decisions. Because "'prospective' has no single meaning," Matlock, supra at 6, Marathon's "prospective only" holding is best measured by the guideposts found in Marathon itself, not by those found elsewhere.

Arguments based on the resulting inequities if filed bankruptcy cases cannot be continued may stem more from considerations of expedience than from analysis of Marathon and the authorities cited in footnote 41. To the extent that expedience, practicality, and the like are proper measures of the prospective effect of Marathon, they may recommend denying jurisdiction to act after December 24, 1982. If there is room for error in interpreting the prospective effect of Marathon, it may be worse to err by finding jurisdiction to act after December 24 than to err by denying jurisdiction. If the Court holds in some future opinion that its "prospective only" holding was limited to the validation of past acts, the post-December 24 exercise of nonexistent jurisdiction will be more damaging to those who rely on orders and judgments of the bankruptcy courts than the postponement of action pending curative legislation or further guidance from the Court.

While it may be argued that the Court did not mean to cut off the exercise of jurisdiction in pending cases because otherwise great hardship would result, this argument is not supported by the authorities cited in Marathon footnote 41. Moreover, as noted in the text, this argument makes the Court's imposition of a stay of its judgment, at least with respect to cases filed before June 28, meaningless.

Section 404(a) and 11 U.S.C. § 105(a).[9] Section 404(a) of the Bankruptcy Reform Act provides that

> The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act,[10] created under section 2a of the Bankruptcy Act,[11] and existing on September 30, 1979,

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9 The trustee does not argue that after Marathon, bankruptcy jurisdiction reverts to its pre-Reform Act status. Others have theorized that Section 404(a)'s continuance of the court structure existing on September 30, 1979 during the transition period between October 1, 1979 and April 1, 1984, coupled with Marathon, revive the jurisdictional provisions of former law.

Section 401(a) of the Reform Act, however, repealed all of the jurisdictional grants found in former law, permitting their use only in cases commenced under former law. Section 404(a), entitled "Courts During Transition," retained the courts, not their jurisdiction. Section 405, entitled "Jurisdiction and Procedure During Transition," provides that Section 241(a) is the sole source of jurisdiction over bankruptcy matters for the courts continued by Section 404(a).

10 Section 1(10) of the Bankruptcy Act supplied the definition of courts of bankruptcy: "'courts of bankruptcy' shall include the United States district courts and the district courts of the Territories and possessions to which this Act is or may hereafter be applicable."

11 Section 2a of the Bankruptcy Act provided for the creation of courts of bankruptcy and their jurisdiction: "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to -- [then follows a list of actions which may be taken]."

> shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act.

11 U.S.C. § 105(a) provides that

> The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

Under Section 404(b) of the Bankruptcy Reform Act, bankruptcy judges serve in the courts of bankruptcy continued under Section 404(a). Pub. L. No. 95-598, § 404(b), 92 Stat. 2683. The existence of the courts of bankruptcy, which constitute separate departments of the United States district courts, is not affected by Marathon, which invalidates the jurisdiction granted in Section 241(a), but does not dissolve the courts of bankruptcy. From these premises, the trustee concludes that the courts of bankruptcy continued under Section 404(a) derive subject matter jurisdiction from 11 U.S.C. § 105.

Disregarding the problems of statutory construction raised by the trustee's argument,[12] the argument fails because 11 U.S.C.

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12 Arguments can be made on both sides of the question of Section 105's availability during the transition period between October 1, 1979 and April 1, 1984. Section 105(a) "became effective on October 1, 1979, under sec. 402(a) of Public Law No. 95-598, and since the bankruptcy court created by 28 U.S.C. § 151(a) does not come into existence under sec. 402(b) of Public Law No. 95-598 until April 1, 1984, there appears to be no statutory recognition of the power of the court of bankruptcy continued through the transitional period by Public Law No. 95-598, sec. 404(a), to 'issue any necessary order, process, or judgment.' Subsections (a)(1) and (b) of sec. 405, however, (Cont. Page 22)

§ 105 does not confer subject matter jurisdiction. Instead, it is an investiture of broad powers to act after subject matter jurisdiction is established.

Section 105 of the Bankruptcy Reform Act is identical to proposals made in H.R. 8200, 95th Cong., 1st Sess. (Sept. 8, 1977) and S. 2266, 95th Cong., 2d Sess. (May 17, 1978). The House and Senate reports on those bills clarify the function of Section 105. House Report 95-595, 95th Cong., 1st Sess. 316 (1977), explained that

> Section 105 is derived from section 2a(15) of present law,[13] with two changes. First, the limitations on the power of a bankruptcy judge (powers that were reserved to the district judge) are removed as inconsistent with the separation of the two courts and the increased powers and jurisdiction of the new court . . . . Second, the bankruptcy judge is prohibited from appointing a receiver in a case under title 11 under any circumstances.[14]

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authorize the bankruptcy judges of the continued court of bankruptcy to exercise the jurisdiction and powers of the bankruptcy courts created by 28 U.S.C. § 151 and those powers surely include the power granted by 11 U.S.C. § 151(a)." Kennedy, "The Bankruptcy Court Under the New Bankruptcy Law: Its Structure, Jurisdiction, Venue, and Procedure," 11 ST. MARY'S L. J. 251, 279 n. 110 (1979).

13 Section 2a(15) provided that the courts of bankruptcy were invested with such jurisdiction as would enable them to exercise original jurisdiction in proceedings under the Bankruptcy Act to "make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: Provided, however, that an injunction to restrain a court may be issued by the judge only."

14 Section 105(b) provides that "notwithstanding subsection (a) of this section, a bankruptcy court may not appoint a receiver in a case under this title."

> . . .
> Section 105 is similar in effect to the All Writs Statute, 28 U.S.C. 1651, under which the new bankruptcy courts are brought by an amendment to 28 U.S.C. 451. H.R. 8200 § 213. The section is repeated here for the sake of continuity from current law and ease of reference, and to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute.

Senate Report 95-989, 95th Cong., 2d Sess. 29 (1978), gave a briefer but consistent interpretation:

> Section 105 is derived from section 2a(15) of present law, with two changes. First, the limitation on the power of a bankruptcy judge (the power to enjoin a court being reserved to the district judge) is removed as inconsistent with the increased powers and jurisdiction of the new bankruptcy court. Second, the bankruptcy judge is prohibited from appointing a receiver in a case under title 11 under any circumstances.

These reports emphasize Section 105 as a source of powers commensurate with the expanded jurisdiction of the bankruptcy courts.

Section 105 is derived from Section 2(a)(15) of the former Bankruptcy Act. "The use of section 2(a)(15) of the Act," according to one commentator, "[was] not to expand the court's jurisdiction, but to give it the right to issue orders in aid of the jurisdiction -- subject to legal principles -- which it already had." Levine, "An Enhanced Conception of the Bankruptcy Judge: From Case Administrator to Unbiased Adjudicator," 84 W. VA. L. REV. 637, 653 (1982).

Section 105 is "similar in effect" to 28 U.S.C. § 1651.[15] Section 1651 "does not operate to confer jurisdiction . . . No new grant of judicial power is contemplated by the statute; § 1651(a) is rather only an incident of jurisdiction. An order may issue pursuant to this statute to preserve jurisdiction already lawfully acquired, but a court may not, by said order, acquire jurisdiction over an individual or property not otherwise subject to its jurisdiction." Commercial Security Bank v. Walker Bank & Trust Co., 456 F. 2d 1352, 1355 (10th Cir. 1972) (footnotes omitted).

Although Section 105(a) is broader than Section 1651(a) because Section 105(a) covers "any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute," House Report, supra, there is no hint in the legislative history or in the Reform Act itself that Section 105(a) is a source of subject matter jurisdiction. Instead, Section 105(a) was placed in the Reform Act "for the sake of continuity from current law," "for ease of reference," and to broaden the powers granted by Section 1651(a). Subject matter jurisdiction was provided for in Section 1471 of the Bankruptcy Reform Act of 1978.

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15 28 U.S.C. § 1651 provides that "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Section 105(a) endows the bankruptcy courts with a broad range of powers they may exercise, within the bounds of necessity and propriety, to carry out the provisions of bankruptcy law. Section 1471 identifies the matters respecting which the bankruptcy courts, applying those and other powers, may issue binding decrees. Without Section 1471, or some other source of subject matter jurisdiction which would permit cases or proceedings to come before the bankruptcy courts for disposition, those powers granted by Section 105(a) are useless.

THE UNITED STATES DISTRICT COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OF THIS ACTION UNDER 28 U.S.C. § 1331

Section 1331 of title 28, United States Code, provides that

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

The trustee maintains that because his complaint alleges causes of action under title 11, Sections 544(b) and 548(a)(2), subject matter jurisdiction lies in the United States district court for this district under Section 1331 and, under the emergency rule adopted by the district court, the trial of his complaint has

properly been referred to this court.[16] Section 1331, however, does not vest jurisdiction of this action in the district court.[17]

1. 28 U.S.C. § 1331 was not intended to grant subject matter jurisdiction of actions arising under the bankruptcy laws of the United States.

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16 The trustee does not argue that the district court derives jurisdiction of this action from 28 U.S.C. § 1334. In light of the analysis in Color Craft Press, supra note 2 at 7 n. 2, Section 1334 is not a valid source of subject matter jurisdiction of this action. But see In re Northland Partners, Case No. 82-05387-W, unpublished order (E. D. Mich. Jan 7, 1983) (District Judge Demascio) ("Congress carefully kept in effect, until 1984, [28 U.S.C. § 1334, which gives] the federal district courts 'original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy.'"); see also Blue v. Mathena, 259 F. Supp. 926, 927 (1966) (former law -- although headnotes suggest the court relied on Section 1334, the court's language and rationale show it relied instead on former 11 U.S.C. § 107(e)). see also In re Jorges Carpet Mills, Inc., supra note 8 (leaving open the question of Section 1334 as a source of bankruptcy jurisdiction post-Marathon).

17 Thus, the issue of the validity of the district court's rule is not reached. If the district court had jurisdiction over this action, the referral of this action to this court under the emergency rule would raise difficult questions. For example, was there authority to adopt the rule? Does the rule conflict with Marathon? Does the rule conflict with those provisions of the Bankruptcy Reform Act not invalidated by Marathon?

The lower federal courts are courts of limited, not general, jurisdiction. They have no subject matter jurisdiction except that given them by Congress. Because they are courts of limited jurisdiction, it has long been the law in the federal courts that "the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without jurisdiction till the contrary appears." Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 11 (1799). Thus, "there are no presumptions in favor of the jurisdiction of the courts of the United States." Ex parte Smith, 94 U.S. 455, 456 (1877). And, therefore, when the inquiry involves the jurisdiction of a federal court, "the presumption in every stage of a cause [is] that it is without the jurisdiction of a court of the United States." Lehigh Mining & Manufacturing Co. v. Kelly, 160 U.S. 327, 337 (1895).

Given this "protective wall built around federal subject matter jurisdiction,"[18] two principles must not be forgotten in interpreting 28 U.S.C. § 1331. First, although Section 1331 provides a broad jurisdictional grant to the federal courts,[19] "with rare exception, the courts have not in fact seen fit to accord to the statutory language the sweep of its constitutional

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18 13 Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE § 3522, at 55 (1975).

19 Powell v. McCormack, 395 U.S. 486, 515 (1969) (citing Mishkin, "The Federal 'Question' in the District Courts," 53 COLUM. L. REV. 157, 160 (1953)).

ancestor [Article III of the Constitution of the United States]."[20] The phrase "arising under . . . the Laws of the United States" in Article III and the identical phrase in 28 U.S.C. § 1331 are not of the same scope.

> [A] different approach is proper in interpreting a jurisdictional statute than that taken in interpreting the constitutional provisions of Article III . . . A broad and liberal construction of Article III in favor of federal judicial power is proper, for the Constitution is permanent in nature, normally has a broader purpose than a statute, and its language should have a living flexibility. A statute granting jurisdiction to a federal court is something quite different. Here Congress is dealing with courts of limited jurisdiction. While the statute should receive a fair interpretation, and at times a broad construction, quite generally it is proper to resolve any ambiguity or uncertainty by construing the statute against federal jurisdiction . . . Mistake, if any, can be rectified by Congress, if it sees fit to do so.

1 MOORE'S FEDERAL PRACTICE ¶0.60 [2.--3], at 618 (1982).

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20 Mishkin, supra note 19.

Because Section 1331 is not as broad as its Constitutional counterpart,[21] authority for the proposition that actions arising under bankruptcy law are within the scope of Article III is not necessarily authority for the proposition that they are within the scope of Section 1331. Thus, descriptions of the breadth of Article III should not be taken as definitions of the scope of Section 1331. For example,

> Bankruptcy matters, arising as they do under the article I, section 8 power of Congress to provide uniform bankruptcy rules, are clearly "federal question" cases. Matters "related to" bankruptcy proceedings, even those resting on state law, can also be considered to "arise under" federal law. Congress has made a policy decision that to implement effectively its duty to impose uniformity on bankruptcy cases, all issues, i.e., all proceedings, that might affect the estate should be resolved in one federal forum. Plenary bankruptcy proceedings therefore flow directly from a legislative power, and they are thus "federal question" article III cases.

Finley, "Article III Limits on Article I Courts: The

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By contrast, 28 U.S.C. § 1471 may be as broad as Article III permits. "Congress intended that the only limits on Federal court jurisdiction in bankruptcy matters should be those established by the Constitution. The [Bankruptcy Reform Act's] grant of subject matter jurisdiction confers on the district courts 'original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.' The [Bankruptcy Reform Act's] legislative history leaves no doubt that this open-ended language should receive the most expansive reading possible. (footnotes omitted)." Comment, "Bankruptcy and the Limits of Federal Jurisdiction," 95 HARV. L. REV. 703, 706 (1982) (citing S. Rep. No. 95-989, 95th Cong., 2d Sess. 153-154 (1978) and H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 445 (1977)).

Constitutionality of the Bankruptcy Court," 1982 ANN. SURV. BANKR. L. 1, 7.

A second rule for interpreting Section 1331 is that Congress' grant of federal question jurisdiction should not be read to include actions Congress did not intend to include. The Supreme Court's opinion in Romero v. International Terminal Operating Co., 358 U.S. 354 (1959), illustrates this rule. There, the Court held that Section 1331 did not grant jurisdiction of claims based on the general maritime law. Before inquiring whether the federal question statute permitted maritime claims "rooted in federal law to be brought on the law side of the lower federal courts," Id. at 359-360, the Court said

> Abstractly stated, the problem is the ordinary task of a court to apply the words of a statute according to their proper construction. But "proper construction" is not satisfied by taking the words as if they were self-contained phrases. So considered, the words do not yield the meaning of the statute. The words we have to construe are not only words with a history. They express an enactment that is part of a serial, and a serial that must be related to Article III of the Constitution, the watershed of all judiciary legislation, and to the enactments which have derived from that Article. Moreover, Article III itself has its sources in history. These give content and meaning to its pithy phrases. Rationally construed, the Act of 1875 [the first lasting statute giving general federal question jurisdiction to a lower federal court] must be considered part of an organic growth -- part of the evolutionary process of judiciary legislation that began September 24, 1789, and projects into the future.

Id. at 360. Section 1331 is understood only in light of its history and purposes. "If the history of the interpretation of judiciary legislation teaches anything," the Court observed, "it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words . . . . The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding." 358 U.S. at 379. Even though an action fits the words of Section 1331, if it is one Congress did not intend to include, proper interpretation of Section 1331 demands its exclusion. "The policy of the statute calls for its strict construction." Healy v. Ratta, 292 U.S. 263, 270 (1934).

The federal district courts established by the Judiciary Act of 1789 were "vested with original jurisdiction over cases in admiralty and some lesser civil and criminal matters." 7B MOORE'S FEDERAL PRACTICE ¶[0--3], at JC-6 (1982). At that time, there was no federal bankruptcy law.

Later, under the short-lived Bankruptcy Acts of 1800[22] and 1841,[23] the district courts became courts of bankruptcy, vested

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22 Act of Apr. 4, 1800, 2 Stat. 19; repealed Dec. 19, 1803, 2 Stat. 248.

23 Act of Aug. 19, 1841, 5 Stat. 440; repealed Mar. 3, 1843, 5 Stat. 614.

with jurisdiction of matters arising under the federal bankruptcy statute.[24] In neither Act was reliance placed on the jurisdictional provisions of the Judiciary Act then existent. During the life of those Acts, except for a brief period between 1801 and 1802 when the Act of Feb. 13, 1801[25] was in force, the federal courts had no general federal question jurisdiction. The Act of Feb. 13, 1801, granted federal question jurisdiction to the old circuit courts, in Section 11 of that Act, as follows: "[T]he . . . circuit courts respectively shall have cognizance . . . of all cases in law or equity, arising under the constitution and laws of the United States." But this jurisdictional grant did not encompass bankruptcy matters. Section 12 of the same Act, provided that "the said circuit courts respectively shall have cognizance concurrently with the district courts, of all cases which shall arise, within their respective circuits, under the act to establish an uniform system of bankruptcy throughout the United States." Federal question

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24 The Act of 1841, supra n. 23, § 6, expressly granted jurisdiction of "all matters and proceedings in bankruptcy arising under this act," and "all cases and controversies in bankruptcy." The Act of 1800, although it had no express jurisdictional provision, "appears to have contemplated that certain specific proceedings and functions (e.g., conducting meetings of creditors, examination of the bankrupt, sending notices, making distributions), would be performed by the commissioners [whose appointment was provided for in the Act], under the supervision of the federal district judge." Reed, Sagar, and Granoff, "Subject Matter Jurisdiction, Abstention and Removal Under the New Federal Bankruptcy Law," 56 AM BANKR. L. J. 121, 125 n. 6 (1982).

25 Act of Feb. 13, 1801, 2 Stat. 89; repealed, Mar. 8, 1802, 2 Stat. 132.

jurisdiction and jurisdiction over cases arising under the bankruptcy law were unconnected.

When the Bankruptcy Act of 1867[26] became law, the lower federal courts still had no federal question jurisdiction. Jurisdiction of actions arising under bankruptcy law, including actions to avoid liens and fraudulent or preferential transfers, was vested concurrently in the federal circuit and district courts by specific provisions in the bankruptcy statute.

In 1875, while the Bankruptcy Act of 1867 was still in place, Congress enacted the Judiciary Act of 1875,[27] which gave the old circuit courts of the United States jurisdiction of "all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States." The jurisdictional provisions of the Bankruptcy Act of 1867 were not mentioned. The Court in Romero described the purpose of the Judiciary Act of 1875 as follows: "the far-reaching extension of national power resulting from the victory of the North, and the concomitant utilization of federal courts for the vindication of that power in the Reconstruction Era, naturally led to enlarged jurisdiction of the federal courts over federal rights." Romero, supra at 368.[28] The aim of the Judiciary Act of 1875 was "to

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26 Act of Mar. 2, 1867, 14 Stat. 517; repealed, Act of June 7, 1878, 20 Stat. 99.

27 Act of Mar. 3, 1875, 18 Stat. 470.

28 See Frankfurter and Landis, THE BUSINESS OF THE SUPREME COURT 65 (1928).

provide a forum for the vindication of new federally created rights," Id., not to duplicate the existing jurisdictional provisions of the bankruptcy law. The Act of 1875, applying by analogy the Supreme Court's analysis of its coverage of maritime claims, "was designed to give a new content of jurisdiction to the federal c urts, not to reaffirm one long-established smoothly functioning" within the confines of the Bankruptcy Act of 1867. Id. Applying the Court's language further in these analogous circumstances, "we have uncovered no basis for finding the additional design of changing the method by which federal courts had administered admiralty [bankruptcy] law from the beginning. The federal admiralty [bankruptcy] courts had been completely adequate to the task of protecting maritime [bankruptcy] rights rooted in federal law." Id. at 368-369. The relationship between federal question jurisdiction and bankruptcy jurisdiction was one of separation, not intersection.

The Bankruptcy Act of 1867 was repealed in 1878, see note 26, supra. When Congress next enacted a bankruptcy law, in 1898,[29] the federal question statute was still in the Judicial Code. If the federal question statute was intended to include bankruptcy jurisdiction, another provision for jurisdiction of actions arising under the new bankruptcy law would have been unnecessary. But Sections 2 and 23 of the Bankruptcy Act of 1898 made specific grants of subject matter jurisdiction to the

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29 Act of July 1, 1898, 30 Stat. 544.

district and circuit courts. Congress placed no reliance on federal question jurisdiction.

In 1903 and in 1910, in response to a decision of the Supreme Court holding that the district courts, sitting as courts of bankruptcy, lacked subject matter jurisdiction of actions by trustees in bankruptcy to avoid liens, fraudulent conveyances, and preferential transfers,[30] Congress granted concurrent jurisdiction of those actions to the state courts and the federal district courts.[31] As a result of these amendments to the Bankruptcy Act of 1898, the bankruptcy statute specifically provided for subject matter jurisdiction of actions to enforce the avoiding powers of the trustee in bankruptcy. In 1911, Congress revised the federal question statute by abolishing the old circuit courts and by transferring all of their jurisdiction, including federal question jurisdiction, to the federal district courts.[32] If the federal question jurisdiction then vested in the district courts included jurisdiction of actions arising under the bankruptcy laws, such as actions to avoid liens, preferences, or fraudulent transfers, no further amendments to the bankruptcy law for such actions would have been necessary. But in 1926, when Congress amended Section 23b of the Bankruptcy Act of 1898 to substitute the words "district courts" for the words "circuit

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31 Bardes v. First National Bank, 178 U.S. 524 (1900).

Act of Feb. 5, 1903, 32 Stat. 797, 798, 800, c. 487, § 8; Act of June 25, 1910, 36 Stat. 838, 840.

32 Act of March 3, 1911, 36 Stat. 1087.

courts,"[33] Congress specifically lodged jurisdiction of actions to set aside liens or preferential or fraudulent transfers in the federal district courts. Again, jurisdiction of actions arising under bankruptcy law was distinct from federal question jurisdiction.

Over the years, this disjunction continued. The bankruptcy law gave jurisdiction of actions arising under bankruptcy law, independently of the federal question jurisdiction vested in the district courts. Congress never invoked the general federal question jurisdiction of the federal district courts as a source of jurisdiction of actions arising under bankruptcy law. In Romero, supra, the Court concluded,

> It is . . . significant that in the entire history of federal maritime legislation, whether before the passage of the Act of 1875 . . . or after . . ., Congress has not once left the availability of a trial on the law side [of the district courts] to inference. It has made specific provision. It is difficult to accept that in 1875 . . . a most far reaching change was made subterraneously.

358 U.S. at 371. The historical separation of the federal question statute from the jurisdictional grants in the successive bankruptcy laws forcefully advocates the same conclusion here. Neither Section 1331 nor any of its predecessors was designed to grant subject matter jurisdiction of actions arising under federal bankruptcy law.

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33 Act of May 27, 1926, 44 Stat. 662. In 1911, the circuit courts ceased to exist and the district courts took their place. See note 32.

Additional support for this conclusion is found in the amount in controversy requirement which, until 1980, limited federal question jurisdiction. The required amount in controversy began at five hundred dollars in 1875 and was raised to two thousand dollars in 1887, to three thousand dollars in 1911, and to ten thousand dollars in 1958.[34] Actions arising under bankruptcy law have never been conditioned on a minimum amount in controversy.

Moreover, federal question jurisdiction, even if meant to cover actions arising under bankruptcy law, may not cover actions arising under bankruptcy laws which incorporate state law as the determinant of the result. In Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900), a federal statute provided that "adverse suits" involving rights to federally owned mining lands, even though such suits were expressly authorized by federal law, did not present federal questions because the federal law authorizing them provided that the outcome of the actions would be determined by the laws of the territory or state in which the land was located.[35] Relying on Shoshone, it may be argued that actions by trustees in bankruptcy under Section 544(b), for example, which permits the trustee to "avoid any transfer . . . that is voidable

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34 See Act of Mar. 3, 1875, 18 Stat. 470; Act of Mar. 3, 1887, 24 Stat. 552; Act of Mar. 3, 1911, 36 Stat. 1091; Act of July 25, 1958, 72 Stat. 415.

35 For a discussion of the Shoshone case, see Mishkin, supra note 19, at 161; 13 Wright & Miller, supra note 18 § 3563, at 418-419.

under applicable law . . . ," do not present federal questions because although actions under Section 544(b) are authorized by federal law, the trustee's rights "may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes." Shoshone, supra at 508.[36] "A statute," such as Section 544(b), "authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute." Id. at 510.

For these reasons, neither 28 U.S.C. § 1331 nor any of its statutory ancestors was intended to grant subject matter jurisdiction over actions arising under the bankruptcy laws of the United States and correct construction of Section 1331 requires its elimination from the possible sources of subject matter jurisdiction over this action.[37]

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36 A cause of action is not one arising under the laws of the United States within the meaning of the federal question statute simply because it is asserted by a trustee in bankruptcy. Bardes v. First National Bank, 178 U.S. 524, 536 (1900); Spencer v. Duplan Silk Co., 191 U.S. 526, 531 (1903); Lovell v. Newman, 227 U.S. 412, 421 (1913); Newland v. Edgar, 362 F. 2d 911, 913 (9th Cir. 1966).

37 Compare In re Conley, _____ B.R. _____, Case No. 382-00990, slip op. at 21-22 (M.D. Tenn. Jan 26, 1983) ("[T]he district courts do not possess bankruptcy jurisdiction as a consequence of their federal question jurisdiction."); contra, Braniff Airways, Inc. v. Civil Aeronautics Board (In re Braniff Airways, Inc.), _____ B.R. _____, Misc. No. 4-221-E, Ft. Worth Bankr. No.

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2. If 28 U.S.C. § 1331 was intended to grant subject matter jurisdiction of actions arising under the bankruptcy laws of the United States, the continued existence of Section 1331 as an independent grant of subject matter jurisdiction of actions arising under the bankruptcy laws is inconsistent with the Bankruptcy Reform Act of 1978.

Assuming that 28 U.S.C. § 1331 granted subject matter jurisdiction of actions arising under the bankruptcy laws of the United States before the enactment of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549, the continued operation of Section 1331 as a grant of subject matter jurisdiction of those actions contradicts the Bankruptcy Reform Act of 1978.[38]

4-82-00369, slip op., at 12 n. 17 (N.D. Tex. Jan. 20, 1983) ("Arguably, any suit to lift the stay is a federal question and cognizable under 28 U.S.C. § 1331."); contra, Chamberlain Livestock v. Aberdeen Production Credit Ass'n., 22 B.R. 750, 752 (D. S.D. 1982). ("A proceeding arising under Title 11 is a case involving a Federal question.")

38 At least two federal courts, ruling before the Bankruptcy Reform Act came into being, relied on Section 1331 in finding subject matter jurisdiction of actions brought against colleges by former students who had received discharges in bankruptcy alleging post-bankruptcy discrimination by means of withholding transcripts of credits for failure to repay student loans. Girardier v. Webster College, 563 F. 2d 1267 (8th Cir. 1977); Handsome v. Rutgers University, 445 F. Supp. 1362 (D.N.J. 1978). These courts found that a federal question was raised because the bankrupts asserted violations of rights granted by federal bankruptcy law. Girardier and Handsome are distinguishable from this action because neither was an action by a trustee in bankruptcy asserting the avoiding powers provisions of the bankruptcy statute. In any event, as will be shown in the text, Congress intended that after the enactment of the Bankruptcy Reform Act, actions such as these be tried in the bankruptcy courts, not in the

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In the Bankruptcy Reform Act of 1978, Congress clearly intended to vest, for all practical purposes, all subject matter jurisdiction of actions arising under the bankruptcy laws in the bankruptcy courts. Section 1471(b) of title 28, U.S.C., enacted by Section 241(a) of the Reform Act, conferred on the district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11." But this grant of jurisdiction to the district courts, as the Supreme Court recognized in Marathon, was a "facade." 102 S. Ct. at 2879. In fact, subject matter jurisdiction was vested in the bankruptcy courts, who, under Section 1471(c), "shall exercise all of the jurisdiction conferred by this section on the district courts." (emphasis supplied).

The legislative history of Section 1471 shows not only that it was to be the sole grant of subject matter jurisdiction of actions arising under title 11, but also that it was to be so broad that any grant of jurisdiction made by Section 1331 would be superfluous.

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district courts. Section 525 of the Reform Act prohibits governmental units such as state colleges from discriminating against persons solely for failure to repay a dischargeable debt. Congress designed 28 U.S.C. § 1471 to include actions brought to enforce the rights granted by Section 525: "Very often, issues will arise after a case is closed, such as . . . the existence of prohibited post-bankruptcy discrimination, proposed 11 U.S.C. 525 . . . The bankruptcy courts will be able to hear these proceedings because they arise under title 11." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 445 (1977) (explanation of Section 1471). Thus, even if Girardier and Handsome correctly interpreted Section 1331, they have been legislatively overruled by the Bankruptcy Reform Act.

Congress intended Section 1471 to be the sole grant of subject matter jurisdiction of proceedings arising under title 11. The Supreme Court in Marathon found that "as part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction . . . [O]ne express purpose of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes." (emphasis supplied). Marathon, supra at 2880 n. 40. (citing H.R. Rep. No. 95-595, supra at 43-48; S. Rep. No. 95-989, 95th Cong., 2d Sess. 17 (1978)).

House Resolution 8200, 95th Cong., 1st Sess. (Sept. 8, 1977), would have vested subject matter jurisdiction of "all civil proceedings arising under title 11 or arising under or related to cases under title 11" directly in the bankruptcy courts. This provision was intended to supplant the existing jurisdictional regime:

> H.R. 8200 grants the bankruptcy courts broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases . . . . All matters arising under title 11, or arising under or related to cases under title 11 will be within the jurisdiction of the bankruptcy court, including proceedings to which the trustee is a party, proceedings to which the debtor is a party if the outcome of the proceeding will have an impact on the case (such as determination of exemptions, determination of dischargeability of debts, liquidation of non-dischargeable debts, and determination of any right granted under title 11), and all proceedings involving the administration of

> the case. The forum shopping and jurisdictional litigation that have plagued the bankruptcy system, the unfairness to defendants from "jurisdiction by ambush," and the dissipation of assets and the expense associated with bifurcated jurisdiction will be eliminated by the jurisdiction proposed by this bill.

H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 48 (1977). (emphasis supplied). Section 1471 would be

> the broadest grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in State court or in Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts.
>
> . . .
>
> The phrase "arising under" has a well defined and broad meaning in the jurisdictional context. By a grant of jurisdiction over all proceedings arising under title 11, the bankruptcy courts will be able to hear any matter under which a claim is made under a provision of title 11 . . . Any action by the trustee under an avoiding power would be a proceeding arising under title 11, because the trustee would be claiming based on a right given by one of the sections in subchapter III of chapter 5 of title 11.

Id. at 445. (emphasis supplied). Thus, actions like this one to avoid transfers under Sections 548 and 544(b) were to be governed solely by the jurisdictional grant of Section 1471, and, furthermore, were to be tried only in the bankruptcy courts.[39]

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39 The statement in the House Report that "the phrase 'arising under' has a well defined and broad meaning in the jurisdictional context" is significant. One of the most prominent appearances of the phrase "arising under" in the law of federal jurisdiction is in 28 U.S.C. § 1331. It is highly unlikely that Congress would grant to the bankruptcy courts jurisdiction of "proceedings arising under title 11" but at the same time harbor a secret intention to permit the phrase "arising under" in Section 1331 to be invoked in the district courts in proceedings arising under title 11.

The Senate's proposal, S. 2266 95th Cong., 2d Sess. (May 17, 1978), would have conferred subject matter jurisdiction of "all civil proceedings arising under title 11 or arising under or related to cases under title 11" on the district courts, but then would have required the bankruptcy judges to exercise "all powers and jurisdiction conferred on the district court." Section 216 of S. 2266, proposed 28 U.S.C. § 1334. While the Senate differed with the House on the appropriate structure of the bankurptcy court system, it was in full agreement that the grant of subject matter jurisdiction over bankruptcy matters should be complete and that bankruptcy jurisdiction at the trial level should be exercised exclusively by the bankruptcy courts, not the district courts:

> It is the purpose [of the Senate's proposed jurisdictional provisions] to eliminate entirely the present jurisdictional dichotomy between summary and plenary jurisdiction. Therefore, except where the bankruptcy court abstains from hearing an action or proceeding arising under or related to a case under title 11, all cases under title 11 and all civil actions and proceedings arising under or related to cases under title 11 are to be before the bankruptcy judge.
>
> Jurisdiction in bankruptcy cases and in civil actions and proceedings arising under or related to bankruptcy cases is vested directly in the district courts . . . [The Senate's proposed jurisdictional provisions], while conferring expanded jurisdiction in bankruptcy cases and related civil actions and proceedings directly upon the district courts, delegate the exclusive exercise of that jurisdiction at the trial level to bankruptcy judges [except as provided in proposed § 1334(d)(2), which prohibited a bankruptcy judge from enjoining another court

or punishing contempts by imprisonment or by a fine of more than $1,000.]

S. Rep. No. 95-989, 95th Cong., 2d Sess. 18 (1978) (emphasis supplied). The Senate intended that "the totality of this jurisdiction [except for punishment of contempts by imprisonment or by a fine of more than $1,000, enjoining other courts, and acting in municipal adjustment and railroad reorganization cases] . . . shall be exercised by the bankruptcy court." Id. at 153. The district courts, with the exceptions just noted, were to function only in an appellate capacity. Id. at 153-154.

Present Section 1471 is a compromise of the positions taken in the House and in the Senate on court structure. At the same time, however, it embodies the clearly expressed intention of both houses of Congress to supply subject matter jurisdiction over bankruptcy matters in a single statute and to ensure that all such jurisdiction would be exercised only by the bankruptcy courts.[40] Moreover, it reflects Congress' decision that the grant of subject matter jurisdiction over bankruptcy matters be as broad as possible. Thus, the continued existence of Section 1331

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40 Accord, Benchic v. Century Entertainment Corp., (In re Century Entertainment Corp.) 20 B.R. 126, 128 (S.D. Ohio 1982) ("The District Court's jurisdiction under title 11, however, should not be exercised by the District Court as a trial court. Instead, Congress has mandated that the Bankruptcy Court, as 'adjunct,' 'shall exercise all of the jurisdiction conferred by this section . . . ' in a scheme which contemplates the independent exercise of the District Court's bankruptcy jurisdiction by the Bankruptcy Court, subject to appellate review by the District Courts or the United States Courts of Appeals. 28 U.S.C. §§ 1334 and 1471(c). The use of the word, 'adjunct,' was not intended to imply . . . the existence of a dual forum option.").

as a grant of subject matter jurisdiction over bankruptcy matters is inconsistent with the Bankruptcy Reform Act, not only because it would split the grant of subject matter jurisdiction between two statutes and permit parties to invoke bankruptcy trial jurisdiction in the district courts, but also because it is superfluous. With respect to bankruptcy matters, Section 1331 grants no jurisdiction not granted by Section 1471.[41]

Construing Section 1331 to grant jurisdiction of actions arising under Title 11 would conflict not only with Section 1471, but also with the transition provisions of the Bankruptcy Reform Act of 1978. During the transition period between October 1, 1979 and April 1, 1984, "all cases commenced under title 11 . . . shall be referred to the United States bankruptcy judges" and "all proceedings in such cases shall be before the United States bankruptcy judges [except proceedings to enjoin courts, certain contempt proceedings, and appeals]." Pub. L. No. 95-598, 405(a)(1), 92 Stat 2685. Permitting proceedings arising under title 11 to be before the United States district courts under 28 U.S.C. § 1331 is inconsistent with this statute.

Moreover, Section 405(b), Pub. L. No. 95-598, 92 Stat. 2685, placed under the heading "Jurisdiction and Procedure During Transition," identifies the source of subject matter jurisdiction of bankruptcy matters during transition.

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41 Accord, In re Conley, supra note 37, at 21: "[A] specific grant of power, such as that contained in § 1471, prevails over the broader language of § 1331."

> During the transition period, the amendments made by sections 241 [which includes the enactment of Section 1471] . . . shall apply to the courts of bankruptcy continued by Section 404(a) of this Act the same as such amendments apply to the United States bankruptcy courts established under section 201 of this Act.

Only Section 1471 was identified. Section 1331 was ignored.

Finally, jurisdiction of bankruptcy civil proceedings under Section 1331 produces irreconcilable conflict between the venue and removal provisions pertaining to district courts and the venue and removal provisions of the Bankruptcy Reform Act of 1978.

28 U.S.C. §§ 1472-1477 and 1478 codify the venue and removal provisions of Section 241(a) of the Bankruptcy Reform Act. Marathon, as noted above, invalidates all of Section 241(a), including the venue and removal statutes. Thus, the district court, if it assumes jurisdiction of bankruptcy cases and proceedings pursuant to 28 U.S.C. § 1331 or some other provision outside Section 241(a), must look to 28 U.S.C. §§ 1391-1407 and 1441, which govern venue and removal in the district courts. These venue and removal rules are so different from those enacted by Section 241(a) of the Bankruptcy Reform Act, however, that their use in bankruptcy cases and proceedings would run afoul of Congress' intent to provide distinct venue and removal rules in bankruptcy.[42]

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[42] Sections 1391-1407 of title 28 contain the venue rules for the district courts. These rules are for "civil actions." No provision is made for bankruptcy cases. If the district courts asserted jurisdiction over bankruptcy cases, they would be left without venue rules. Equally difficult problems would result in bankruptcy civil proceedings. The venue of civil proceedings was covered by 28 U.S.C. §§ 1473, 1475, and 1477, now invalidated by Marathon. These provisions are different from the venue rules

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In summary, even if under former law Section 1331 granted jurisdiction of bankruptcy civil proceedings, the continued existence of that jurisdiction is inconsistent with the Bankruptcy Reform Act of 1978.

CONCLUSION

Recognizing that hardship and disruption may result from a decision denying the jurisdiction of district and bankruptcy courts over this and similar actions, the court has carefully sought a valid basis for subject matter jurisdiction. Having

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applicable in the district courts. For example, Section 1473(a) provides that proceedings arising in or related to a case under title 11, with two exceptions found in 1473(b) and (d), may be commenced in the bankruptcy court in which the title 11 case is pending. Section 1391, on the other hand, generally places venue in the district where all plaintiffs or all defendants reside or in which the claim arose in diversity actions, and in the district where all defendants reside or in which the claim arose in non-diversity actions. Section 1475 permits a change of venue "to a bankruptcy court for another district, in the interest of justice and for the convenience of the parties." But Section 1404(a) permits a change of venue "to any other district or division where it might have been brought," and only "for the convenience of parties and witnesses."

Removal to the bankruptcy courts was governed by 28 U.S.C. § 1478, now invalidated by Marathon. Removal to the district courts is governed by 28 U.S.C. § 1441. While Section 1478 permits "a party" to remove, only "the defendant or the defendants" may remove under Section 1441. While Section 1478 permits removal of "any claim or cause of action in a civil action," Section 1441 provides only for removal of a "civil action." Although under Section 1478 a claim or cause of action may be removed from any court, state or federal, except the United States Tax Court, under Section 1441 a civil action may be removed only from state courts. Under Section 1478, removal is to "the bankruptcy court for the district where such civil action is pending," but under Section 1441 removal is to "the district court of the United States for the district and division embracing the place where such action is pending." Finally, while removal can occur under Section 1478 "if the bankruptcy courts have jurisdiction over [the] claim or cause of action," removal can occur under Section 1441 only if "the district courts of the United States have original jurisdiction."

searched and finding no jurisdiction, it is the court's duty to dismiss the trustee's complaint.

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause . . . [J]udicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514-515 (1869).

The exercise of jurisdiction when none exists would violate my oath of office and do catastrophic and irreparable harm to those who act in reliance upon the court's orders and judgments. The court certifies that the circumstances require immediate review.

Marathon's invalidation of Section 241(a) and the absence of curative legislation have closed the doors of the federal courts to civil proceedings arising under bankruptcy law. For the present, at least for this action and others like it, no legitimate source of jurisdiction appears. An order consistent with this opinion was entered which will be stayed by this court pending appeal.

DATED this 7th day of February, 1983.

BY THE COURT:

Glen E. Clark

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

IN RE:

JAMES C. CONLEY and
LAURA J. CONLEY,

Debtors Case No. 382-00990, et al

and ALL OTHER DEBTORS HAVING
CONFIRMED AND PENDING CHAPTER 13
CASES IN WHICH COMMERCE UNION BANK
IS A CREDITOR

MEMORANDUM AND ORDER

This matter is before the court on Commerce Union Bank's motion to compel the Chapter 13 trustee Henry E. Hildebrand to distribute funds currently held by the trustee in this and all other Chapter 13 cases in which Commerce Union Bank is a creditor. The trustee has responded by requesting a declaratory judgment from this court as to what, if any, subject matter jurisdiction this court continues to possess over pending and future Chapter 13 cases in light of the United States Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., _____ U.S. _____, 102 S.Ct. 2858 (1982).[1] These cases are pending before both bankruptcy judges of this district. In a decision entered contemporaneously with this opinion, this court has concluded that it retains subject matter jurisdiction under 28 U.S.C. § 1471 of the 1978 Bankruptcy Reform Act to adjudicate any matter or proceeding arising in a case commenced on or before December 24, 1982. Walter E. Heller & Co. v. Matlock

Trailer Corp., Case No. 382-02778, Adv. Proc. No. 382-0755 (Bankr. M.D. Tenn. January 26, 1983). The only issue remaining, therefore, concerns this court's jurisdiction to adjudicate Chapter 13 cases filed subsequent to December 24, 1982. Upon consideration of the evidence presented at the hearing, briefs of the parties, stipulations and the entire record, this court concludes that it lacks subject matter jurisdiction to adjudicate any case commenced after December 24, 1982, including cases initiated under Chapter 13 of the Bankruptcy Reform Act.

The hearing of this matter is necessitated by the Supreme Court's decision not to extend the stay of its opinion in Northern Pipeline beyond December 24, 1982. In Northern Pipeline, the Supreme Court found the broad grant of jurisdiction to the bankruptcy courts contained in § 241(a) of the Bankruptcy Reform Act of 1978 unconstitutional on the grounds that § 241(a) "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct."[2] Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2879-2880. See also In re Rivers, 19 Bankr. 438 (Bankr. E.D. Tenn. 1982). The Court held that Article III of the United States Constitution precluded Congress from delegating the broad judicial powers encompassed in § 241(a) to judges who lacked the protections of lifetime tenure and guaranteed salaries.[3] Although the Northern Pipeline opinion was issued on June 28, 1982,

the Court stayed its judgment until October 4, 1982, in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2880. This court subsequently determined that the Supreme Court's stay permitted bankruptcy courts to exercise § 241(a) jurisdiction until October 4, 1982, so as to avoid "immediate chaos in the administration of bankruptcy cases." Schneider v. 2-Star Foods, Inc. (In re Cumberland Enterprises, Inc.), 22 Bankr. 626, 631 (Bankr. M.D. Tenn. 1982). See also McAllester v. Aldridge (In re Anderson), Case No. 181-03033, Adv. Proc. No. 182-0505, slip op. at 2 (Bankr. M.D. Tenn. August 26, 1982). When Congress failed to take any action prior to the expiration of the initial deadline, the Supreme Court extended the stay until December 24, 1982. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., _____ U.S. _____, 103 S. Ct. 199-200 (1982). See also United States v. Security Industrial Bank, _____ U.S. _____, 74 L.Ed.2d 235, 240 n.5 (1982). That date has also come and gone without Congress taking any measures to rectify the emasculated jurisdictional grant. Apparently dissatisfied with Congressional inaction on the issue, the Supreme Court refused to continue the stay past December 24, 1982. See 51 U.S.L.W. 2382.

In anticipation of the failure of the United States House of Representatives and the United States

Senate to act in accordance with Northern Pipeline and the refusal of the United States Supreme Court to extend its stay, the Judicial Conference of the United States Courts requested the Director of the Administrative Office of the courts to provide each circuit with a proposed rule to permit the bankruptcy system to continue without disruption. Judicial Conference Resolution (September 23, 1982). The Director, William E. Foley, attempted to comply by providing a proposed rule drafted in the United States Court of Appeals for the Ninth Circuit. See, e.g., Doctor v. Gleicher (In re Stillman), Case No. 81-1-0964, Adv. Proc. No. 82-0073A, slip op. at 7 (Bankr. D. Md. January 13, 1983); Letters from William E. Foley (September 27 and December 3, 1982) (discussing proposed rule). Thereafter the Judicial Council for the United States Court of Appeals for the Sixth Circuit promulgated a version of Mr. Foley's rule as an "emergency rule" which the United States District Court for the Middle District of Tennessee adopted on December 24, 1982, to "convey to the bankruptcy judges of this district authority to act in bankruptcy cases and proceedings until the Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., _____ U.S. _____, 102 S.Ct. 2858 (1982), or until March 31, 1984, whichever first occurs." In re Administration of the Bankruptcy System, Adm. Order No. 28(a), at 1 (M.D. Tenn. December 24, 1982). (A copy

of this rule is made an appendix to this Memorandum and hereinafter said rule shall be referred to as "Adm. Order No. 28").

The Chapter 13 trustee for this district has now refused to distribute funds in and administer both pending and future Chapter 13 cases because of the questionable jurisdiction possessed by this court. As a result, Commerce Union Bank has filed this motion to compel distribution and the trustee has requested a declaration regarding the jurisdictional question.

A brief history of § 241(a) of the Bankruptcy Reform Act of 1978 is necessary to place the problem now confronting the court in proper perspective. The Bankruptcy Reform Act of 1978 itself was, as explained by one commentator, conceived in an atmosphere "surrounded by controversy and intrigue." Klee, Legislative History of the New Bankruptcy Law, 28 DePaul L. Rev. 941, 942 (1979). This characterization is equally descriptive of the events which culminated in the enactment of the jurisdictional provisions contained in § 241(a). After decades of battling with the bifurcated district court/bankruptcy court jurisdictional provisions of the 1898 Bankruptcy Act, one of the principal new features of the Bankruptcy Code of 1978 was the consolidation of all bankruptcy jurisdiction in one bankruptcy court. One of the central issues confronting Congress in establishing this new single court structure was whether the expanded jurisdictional grant to the bankruptcy courts necessitated the conferral of Article III

status, with its protections of lifetime appointment and guaranteed salaries, upon the new bankruptcy judges. After extensive study, the House of Representatives concluded that the Constitution required Article III courts to adjudicate the broad range of matters arising under the revamped Bankruptcy Reform Act. H.R. 8200, 95th Cong., 1st. Sess. (1977). See Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 2d Sess., 2081, 2084 and 2682-2706 (1976); H.R. Rep. No. 595, 95th Cong., 1st Sess. 23-39, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5984-6000. See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2866 n.12; Klee, supra, at 945-948. The House's finding was based in large part upon the Subcommittee on Civil and Constitutional Rights' reports which, buttressed by the opinions of many leading experts, had concluded that Article III bankruptcy courts were constitutionally required. Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Constitutional Bankruptcy Courts, 95th Cong. 2d Sess., 33 (Comm. Print. No. 3, 1977); Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Report on Hearings on the Court Administration Structure for Bankruptcy Cases, 95th Cong., 2d Sess., 5 (Comm. Print No. 13, 1978). The Senate bill, however, did not adopt the Article III status proposed by the House, opting instead for the creation of bankruptcy courts as adjuncts to the district courts under the auspices of Article I. S. 2266, 95th Cong.,

2d Sess. (1978).

The decision to accept the Senate's proposal, in disregard of the possible constitutional infirmity of such a broad grant of jurisdiction to non-Article III bankruptcy judges, was the result of a series of last minute compromises between the managers of both houses. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2866 n.12. See also Klee, supra, at 952-956. Strong political opposition existed against conferring Article III status on bankruptcy judges and therefore the provision in the House bill creating Article III bankruptcy judges was deleted in order to insure passage of the bankruptcy legislation before the end of the congressional session. See Klee, supra, 952-956; Klein, The Bankruptcy Reform Act of 1978, 53 Am. Bank. L.J. 1, 4 (1979). There can thus be little doubt that the final determination to create non-Article III bankruptcy courts was at least partially motivated by political concerns. The concerns and fears of those stressing the need for Article III bankruptcy courts were ultimately realized in the Supreme Court's Northern Pipeline decision declaring § 241(a) unconstitutional as an unauthorized delegation by Congress of Article III powers to an Article I court.

Having traced the events which gave rise to this proceeding, the court must now address the issue of whether this court retained any subject matter jurisdiction over cases filed after December 24, 1982, the effective date of the Supreme Court's Northern Pipeline decision; and, if no subject matter jurisdiction remains

in this court to adjudicate cases commenced after that date, whether the emergency rule conferred any jurisdiction upon this court.[5]

After careful consideration, this court concludes that, for a number of reasons, it lacks subject matter jurisdiction to entertain any bankruptcy case filed subsequent to December 24, 1982. First, the language of the plurality and concurring opinions in Northern Pipeline leaves no doubt that bankruptcy courts no longer possess any jurisdiction under 28 U.S.C. § 1471 to adjudicate cases filed after December 24, 1982. The plurality and concurring opinions both agreed that § 241(a), later codified in part as 28 U.S.C. § 1471, was unconstitutional. Justice Brennan, writing for the plurality, held that "the broad grant of jurisdiction to the bankruptcy courts contained in § 241(a) is unconstitutional." Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2880. Justices Rehnquist and O'Connor concurred in this finding. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2882 (Rehnquist, J. and O'Connor, J., concurring). The conclusion is thus inescapable that, once the Northern Pipeline decision became effective on December 25, 1982, this court lost any subject matter jurisdiction possessed pursuant to § 1471 over cases initiated after December 24, 1982.[6]

Nor can this court accept, as a few commentators have suggested, the argument that the jurisdictional provision of the 1898 Bankruptcy Act was miraculously resur-

rected upon the abrogation of § 241(a). See, e.g., Memorandum from Carl Imlay, General Counsel for the Administrative Office of United States Courts, to William E. Foley, Director of the Administrative Office of United States Courts (July 22, 1982), reprinted in H.R. Rep. No. 807, 97th Cong., 2d Sess. 30 (1982). Section 401(a) of the Bankruptcy Reform Act explicitly repealed the former 1898 Bankruptcy Act in its entirety as of October 1, 1979. § 401(a), 92 Stat. 2682 (1980). The jurisdictional provisions of the 1898 Act thus ceased to be of any effect after that date. Although authority exists for the proposition that an unconstitutional statute may not repeal a prior valid statute, see, e.g., Frost v. Corporation Commission, 278 U.S. 515, 526-527 (1929); Stewart v. Waller, 404 F.Supp. 206, 215 (N.D. Miss. 1975), this analysis does not apply in Northern Pipeline since the Supreme Court held only the jurisdictional grant contained in § 241(a) unconstitutional. The Court did not invalidate § 401(a) or the remainder of the Bankruptcy Reform Act.

Nor does § 404(a), which maintains the old bankruptcy court structure during the transition period, infer that the jurisdictional provisions of the 1898 Act were preserved under the new Act.[7] Section 404(a) merely retains the physical court structure "created under section 2a of the Bankruptcy Act" and does not purport to continue the jurisdictional provisions of § 2a. § 404(a), 92 Stat. 2683. In fact, § 405(b) expressly provides that the jurisdictional provisions of § 241(a) "shall apply to the courts of bank-

ruptcy continued by section 404(a) of this Act." § 405(b), 92 Stat. 2685.

Furthermore, the Supreme Court in Northern Pipeline gave absolutely no indication that the jurisdictional grant contained in the 1898 Act was revived by the finding that § 241(a) of the 1978 Act was unconstitutional. Quite to the contrary, a reading of Northern Pipeline indicates that the Supreme Court contemplated exactly the opposite result. The Court's imposition of a stay of their decision to afford Congress an opportunity to reconstitute the bankruptcy courts without impairing the interim administration of the bankruptcy laws at least infers the Court believed that, once Northern Pipeline became effective, the bankruptcy courts would have no jurisdictional foundation to adjudicate cases filed after Northern Pipeline. See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2880; id at 2882 (Rehnquist, J. and O'Connor, J., concurring). In addition, the plurality opinion casts grave doubts on the validity of the jurisdictional provision contained in the 1898 Act.[8] This court can only surmise that the Supreme Court would have expanded its analysis of the jurisdictional faults of the 1898 Act if those jurisdictional provisions were in fact reinstituted once § 241(a) was found unconstitutional.

For these reasons, this court must conclude that § 401(a) of the Bankruptcy Reform Act repealed the former 1898 Act and that the repealer provision was not affected by the Supreme Court's subsequent finding in

Northern Pipeline that the jurisdictional grant of § 241(a) was unconstitutional. In re Motion to Dismiss: Constitutionality of Jurisdiction of the Bankruptcy Court, 23 Bankr. 334, 343-346 (Bankr. M.D. Ga. 1982). See also Letters of Frank R. Kennedy, Vern Countryman, Lawrence P. King, William J. Rochelle, Jr., Dean M. Gandy, Richard Levin, Joseph E. Friend and George M. Treister to Representative Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, H.R. Rep. No. 807, supra, at 32-49.

Lastly, this court finds that the consent of the parties cannot be considered as a source of jurisdiction for the bankruptcy courts. The law of jurisprudence is well established that, where the court lacks subject matter jurisdiction to hear a case, the parties cannot create jurisdiction by agreement or consent. See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea, _____ U.S. _____, 72 L.Ed. 2d 492, 500-501 (1982); California v. La Rue, 409 U.S. 109, 112 n.3 (1972); Sea-Land Service, Inc. v. International Longshoremen's Association, 625 F.2d 38, 41 (5th Cir. 1980); 5 Wright & Miller, Federal Practice and Procedure § 1350, at 546 (1969).

Since this court lacks any direct statutory source of jurisdiction other than § 241(a) of the Bankruptcy Reform Act, the question next arises whether the emergency rule drafted in the Ninth Circuit and eventually adopted by the District Court for the Middle District of Tennessee confers any subject matter jurisdiction on this court.

The emergency rule seeks to accomplish one of two purposes. It must either continue jurisdiction in the bankruptcy courts pursuant to the Bankruptcy Reform Act of 1978 or create some form of interim jurisdiction in the bankruptcy courts pending Congressional resolution of the jurisdictional problems raised in Northern Pipeline. For a multitude of reasons, this court concludes that the rule cannot under either premise constitutionally bestow jurisdiction on this court. See Hearings on Omnibus Bankruptcy and Court Reform Legislation before the SubCommittee on Courts of the Senate Comm. on the Judiciary, 97th Cong. 2d Sess. 2-6 (1982) (statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy).

If the rule attempts to somehow continue jurisdiction under the Bankruptcy Reform Act in cases filed after December 24, 1982, then it is in direct conflict with the Supreme Court's opinion in Northern Pipeline. The Court found in Northern Pipeline that the Congressional grant of jurisdiction to the bankruptcy courts as encompassed in § 241(a) was unconstitutional in its entirety. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2880; id, 102 S.Ct. at 2882 (Rehnquist, J. and O'Connor, J., concurring). Although the Supreme Court did stay the effect of Northern Pipeline until December 24, 1982, once the Court determined not to extend the stay the decision became binding law as to any case commenced after the expiration of the stay. Neither the

Judicial Council nor the district court can alter the outcome of Northern Pipeline by the implementation of a rule.

This court further rejects the contention that either the Judicial Council or the district court can create interim jurisdiction in the bankruptcy courts to handle bankruptcy adjudications. The United States Constitution grants only Congress the power to confer jurisdiction upon inferior courts, either through the exercise of its Article I or Article III powers. U.S. Const. art. I, § 8 cl., 9 and art. III, § 1. See also Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978); Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Kline v. Burke Construction Co., 260 U.S. 226, 233-234 (1922); Graves v. Sneed, 541 F.2d 159, 161 (6th Cir. 1976), cert. denied 429 U.S. 1093 (1977); Jorden v. Metropolitan Utilities District, 498 F.2d 514, 516 (8th Cir. 1974); Markham v. City of Newport News, 292 F.2d 711, 713 (4th Cir. 1961); Eastern Federal Corp. v. Wasson, 525 F.Supp. 241, 243 (D. S.C. 1981); Rompe v. Yablon, 277 F.Supp. 662, 664 (S.D.N.Y. 1967); 1 Moore's Federal Practice ¶ 0.60 [2.-3], at 616.1 to 617 (2d ed. 1982); 13 Wright & Miller, Federal Practice and Procedure § 3526, at 113-114 (1975). As the Supreme Court noted in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2868 n.15:

> "The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice." (emphasis added).

Therefore, to repose jurisdiction in the bankruptcy courts to hear bankruptcy cases filed after the

effective date of Northern Pipeline, the district court itself must possess jurisdiction over these bankruptcy cases, the Constitution must not prohibit the district court from delegating or transferring its jurisdiction and express statutory authority must exist which grants the district court the power to delegate this jurisdiction to an inferior tribunal. The emergency rule as adopted fails to satisfy any of these prerequisites.

First, this court finds that the district court lacks any subject matter jurisdiction over bankruptcy matters. The district court clearly does not possess any continuing jurisdiction under 28 U.S.C. § 1471. Although § 1471(a) grants the district courts "original and exclusive jurisdiction" of all bankruptcy adjudications, § 1471(c) provides that the bankruptcy courts "shall exercise all of the jurisdiction conferred" under § 1471(a). 28 U.S.C.A. § 1471(a) and (c) (West Supp. 1982). Both the plurality and concurring opinions in Northern Pipeline refused to sever the jurisdictional grant in § 1471 between the bankruptcy courts, which the court found unconstitutional as presently constructed, and the district courts. Instead, both opinions unequivocally stated that § 241(a) was unconstitutional in its entirety. Justice Brennan expressed these views for the plurality when he wrote:

> "It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and

has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes...Nor can we assume, as THE CHIEF JUSTICE suggests..., that Congress' choice would be to have this case 'routed to the United States district court of which the bankruptcy court is an adjunct.' We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose." (citations omitted).

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2880 n.40. The two concurring Justices agreed with the plurality's analysis, stating:

"All matters of fact and law in whatever domains of the law to which the parties' dispute may lead are to be resolved by the Bankruptcy Court in the first instance, with only traditional appellate review apparently contemplated by Art. III courts. Acting in this manner the Bankruptcy Court is not an 'adjunct' of either the District Court or the Court of Appeals.

I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution. Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under § 241(a), see ante, at 2880 n.40, I concur in the judgment."

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2882 (Rehnquist, J. and O'Connor, J., concurring).

Nor does the district court possess any juris-

diction over bankruptcy adjudications by virtue of 28 U.S.C. § 1334, which grants district courts "original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy." 28 U.S.C.A. § 1334 (West 1976 & Supp. 1982). While § 238(a) amends § 1334 to provide that the district courts shall only have appellate jurisdiction over bankruptcy courts, this amendment does not take effect until April 1, 1984. See § 238(a), 92 Stat. 2667-2668; § 402(b), 92 Stat. 2682. This fact has led some commentators and at least one court to suggest that § 1334 continues original jurisdiction of bankruptcy "matters and proceedings" in the district courts until April 1, 1984. See, e.g., Prudential Insurance Co. v. Stouffer Corp. (In the Matter of Northland Point Partners), Case No. 82-05387-W, Adv. Nos. 82-2277-W and 82-2332-W, slip op. at 2. (E.D. Mich. January 7, 1983). Such an interpretation, however, is directly contrary to specific provisions of the Bankruptcy Reform Act. In the Bankruptcy Reform Act, Congress chose to place all subject matter jurisdiction over bankruptcy cases and proceedings in the bankruptcy courts. See 28 U.S.C.A. 1471(c) (West Supp. 1982). Furthermore, § 405(b) expressly provides that during the transition period § 241(a) shall apply "to the courts of bankruptcy continued by section 404(a) of this Act." § 405(b), 92 Stat. 2685. The term "courts of bankruptcy" in § 405(b) includes district courts.[9] The district courts' jurisdiction under the Bankruptcy

Reform Act must therefore be defined exclusively by reference to § 1471. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 445-446, reprinted in 1978 U.S. Code Cong. and Ad. News 5787, 6400-6401; S. Rep. No. 989, 95th Cong., 2nd Sess. 153-154 reprinted in 1978 U.S. Code Cong. and Ad. News 5787, 5939-5940. See also In re Motion to Dismiss: Constitutionality of Jurisdiction of the Bankruptcy Court, 23 Bankr. at 345. Since § 1471(c) vests the entirety of the district courts' jurisdiction over bankruptcy adjudications in the bankruptcy courts, the district court simply possesses no subject matter jurisdiction over bankruptcy cases and proceedings.

The logic of this conclusion is also dictated by several other factors. First, the technical language of § 1334 creates serious questions as to the scope of a district court's purported jurisdiction over bankruptcy adjudications arising under the Bankruptcy Reform Act. Section 1334 grants district courts original jurisdiction of "all matters and proceedings" in bankruptcy. 28 U.S.C.A. § 1334 (West Supp. 1982) (emphasis added). While the terms "matters and proceedings" may appear to be all inclusive, these are in fact terms of art which have limited definitions under the Bankruptcy Reform Act. "Matters" refers to contested matters arising in a bankruptcy case whereas "proceedings" either refers to a defined set of adversary proceedings which may be commenced in connection with a bankruptcy case or, in a broader context, to anything that occurs within a case. See Fed. R. Bankr. Pro. 701

& 914; H.R. No. 595, 95th Cong., 1st Sess. 445, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 6400-6401; S. Rep. No. 989, 95th Cong., 2nd Sess. 153-154 reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5939-5940. See also Official Unsecured Creditors' Committee v. Michaels (In the Matter of Marin Motor Oil, Inc.), 689 F.2d 445, 450-451 (3rd Cir. 1982); Briney v. Burley, 11 Bankr. 369, 381-384 (Bankr. C.D. Cal. 1981). Section 1334 simply does not provide, as § 1471 does, district courts with "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1471(a) (West 1979) (emphasis added). Surely, Congress would have amended § 1334 to include this broader language if § 1334 was intended to have any continuing viability after passage of the Bankruptcy Reform Act.

Secondly, even assuming that § 1334 conferred subject matter jurisdiction over bankruptcy cases to the district courts, the district courts would still lack authority to issue any orders administering property of the bankruptcy estate, whether the property was within or outside the district court's boundaries. Section 1334's grant of jurisdiction was predicated upon the court's power under § 2a(20) [11 U.S.C. § 11 (repealed 1978)] to exercise jurisdiction over persons or property within their respective territorial limits. When this provision was repealed by the Bankruptcy Reform Act in 1978, Congress gave the bankruptcy courts exclusive jurisdiction over

all the debtor's property, wherever located, pursuant to § 1471(e). 28 U.S.C.A. § 1471(e) (West Supp. 1982). As this court has previously noted, the Supreme Court in Northern Pipeline determined that § 241(a), which was codified in part as § 1471(e), is unconstitutional in its entirety. Therefore, with § 2a.(20) effectively repealed and § 1471(e) declared unconstitutional and of no effect, the district courts, even if possessing subject matter jurisdiction, have no authority to administer or distribute property of the bankruptcy estate. Until such time as Congress establishes jurisdiction in a federal court over property of a bankrupt estate, this court can only conclude that the district court has no power to control such property.

Finally, the Bankruptcy Reform Act continues the administration of bankruptcy cases in the United States Bankruptcy Clerk's office, an entity entirely separate and distinct from the United States District Clerk's office. See § 404(e), 92 Stat. 2685. The bifurication of the administration of bankruptcy petitions from the court which would ultimately handle these adjudications would result in a bureauracratic nightmare. Such a chaotic outcome clearly could not have been intended by Congress when they enacted the Bankruptcy Reform Act.

In conclusion, a reading of § 405(b), 1334 and 1471 clearly reveals that not only was § 1471 intended to be the sole source defining where bankruptcy jurisdiction resides but also that § 1334 is blatantly irreconcilable

with both § 405(b) and § 1471. Therefore, although repeal by implication is not favored, no other reasonable conclusion can be reached except that § 1334 was implicitly repealed by Congress' enactment of the Bankruptcy Reform Act.[10] See, e.g., Kremer v. Chemical Construction Corp., _____ U.S. _____, 72 L.Ed.2d 262, 271-272 (1982); Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976); Posadas v. National City Bank, 296 U.S. 497, 503 (1936). See generally In re Wolf, Bankr. L. Rep. (C.C.H.) ¶ 67,947, at 78,879-78,880 (D. Mass. 1981) (district court refused to accept original jurisdiction of a motion for declaratory judgment in a bankruptcy proceeding pursuant to 28 U.S.C. § 1334 on the basis that the party requesting the motion cannot bypass the appellate procedures to the district court set forth in the Bankruptcy Reform Act).

This analysis is consistent with the Supreme Court's opinion in Northern Pipeline. The plurality and concurring opinions each recognize that § 241(a), although placing jurisdiction over bankruptcy adjudications in the district courts, designated the bankruptcy courts as the "ultimate repository" of the Bankruptcy Reform Act's broad jurisdictional grant. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2862 n.3; id at 2882 (Rehnquist, J. and O'Connor, J. concurring). Furthermore, both the plurality and concurrence refused to sever the § 241(a) jurisdictional grant between the bankruptcy and district courts. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at

2880 n.40; id at 2882 (Rehnquist, J. and O'Connor, J., concurring). Instead, both opinions opted to stay the Northern Pipeline decision in order to afford Congress an opportunity to restructure the jurisdictional foundation of the Bankruptcy Reform Act. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2880 n.40; id at 2882 (Rehnquist, J. and O'Connor, J., concurring). This court finds it improbable that the Supreme Court would have imposed this stay to permit Congress to restructure the jurisdictional foundation of the 1978 Bankruptcy Reform Act if the district courts did already possess jurisdiction over bankruptcy cases pursuant to 28 U.S.C. § 1334.[11]

For these same reasons, this court also concludes that the district courts do not possess bankruptcy jurisdiction as a consequence of their federal question jurisdiction, which is defined in 28 U.S.C.A. § 1331 (West Supp. 1982) to include all civil actions "arising under the...laws...of the United States." In addition, the court would note the well established maxim of statutory construction that a specific grant of power, such as that contained in § 1471, prevails over the broader language of § 1331. See, e.g., Busic v. United States, 446 U.S. 398, 406 (1980); Essenfeld v. Commissioner, 311 F.2d 208, 210 (2d Cir. 1962); Cornelius v. Benevolent Protective Order of the Elks, 382 F.Supp. 1182, 1201 (D. Conn. 1974); McClellan v. Shapiro, 315 F.Supp. 484, 487 n.7 (D. Conn. 1970). And, even assuming § 1331 did confer jurisdiction over bankruptcy cases to district courts, this grant of jurisdiction would not be exclusive. Federal question jurisdiction under § 1331 is therefore not sufficiently broad

to encompass numerous matters, involving essentially no federal question whatsoever, which traditionally have been within the jurisdiction of a federal bankruptcy court. See Williams v. Austrian, 331 U.S. 642, 657-658 (1947); Horvath v. Pitney, 51 F.Supp. 886, 887 (D. N.J. 1943).

In sum, until Congress clearly sets forth where bankruptcy jurisdiction should reside in the aftermath of Northern Pipeline, no jurisdiction exists in either the bankruptcy or the district courts to hear cases arising under the Bankruptcy Reform Act which are filed after December 24, 1982. As Bankruptcy Judge Norton for the Northern District of Georgia recently explained, "[I]n the absence of clear constitutional or federal statutory jurisdiction, jurisdiction must be denied by federal courts." In re Motion to Dismiss: Constitutionality of Jurisdiction of the Bankruptcy Court, 23 Bankr. at 346. See also Grace v. American Central Insurance Co., 109 U.S. 278, 283 (1883); Young Properties Corp. v. United Equity Corp., 534 F.2d 847, 849-850 (9th Cir. 1976); City of Lawton v. Chapman, 257 F.2d 601, 603 (10th Cir. 1958). It is elementary that, if the district court lacks jurisdiction itself, then it cannot by implementation of a rule create jurisdiction in the bankruptcy courts. The United States Constitution confers the power to create jurisdiction exclusively upon Congress. U.S. Const. art. I, § 8, cl. 9 and art. III, § 1. See, e.g., Owen Equipment & Erection Co. v. Kroger, 437 U.S. at 374; Lockerty v. Phillips,

319 U.S. at 187; Kline v. Burke Construction Co., 260 U.S. at 233-234; 1 Moore's Federal Practice ¶ 0.60 [2.-3] at 616.1 - 617 (2d ed. 1982).

In any event, even assuming that the district court does possess subject matter jurisdiction over bankruptcy cases, such a broad grant of jurisdiction as encompassed in the rule cannot constitutionally be delegated to this court. The Supreme Court in Northern Pipeline expressly refused to validate this type of delegation of judicial authority. Indeed, the plurality termed the bankruptcy court's exercise of jurisdiction as adjuncts of the district courts a mere facade. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2879. Although the concurring opinion was restricted to the more limited holding that only proceedings involving facts similar to the Northern Pipeline lawsuit must be heard by an Article III judge, both opinions refused to condone a jurisdictional structure whereby the entirety of bankruptcy jurisdiction was vested solely in Article I bankruptcy courts and any "Article III controversy" which arose was simply routed to the district courts. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2880, n. 40; id at 2882 (Rehnquist, J. and O'Connor, J., concurring).

The emergency rule implements the exact system which the Supreme Court declined to sanction. The rule refers all "cases under Title 11 and all civil proceedings

arising under Title 11 or arising in or related to cases under Title 11" to the bankruptcy judges of this district. Adm. Order No. 28(c)(1), at 3. The rule thus contemplates that these adjudications shall be heard in the first instance by the bankruptcy judge. Furthermore, although the rule provides that in "related proceedings," unless the parties agree otherwise, the bankruptcy judge may not enter a judgment or dispositive order without the approval of the district judge, the list of matters which are not considered "related proceedings" include virtually every proceeding that could occur under the operation of the bankruptcy laws.[12] Adm. Order No. 28(d)(3)(A) & (B), at 5-6. And, even though on appeal to the district court the determinations of the bankruptcy court are given no deference, the review on appeal does not require a de novo hearing by the district court judge. Adm. Order No. 28(e)(2)(B), at 7. In short, even a cursory examination of the rule leads to the inescapable conclusion that the district court has, in disregard of the Northern Pipeline decision, abdicated its purported jurisdiction over bankruptcy cases and proceedings to a non-Article III court. The district court's broad delegation of authority to this court to formulate binding judicial decisions in bankruptcy adjudications cannot be constitutionally sustained under Article III and the corollary doctrine of separation of powers. See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2874-2880; United States v. Raddatz, 447 U.S. 667, 682 (1980); Mathews

v. Weber, 423 U.S. 261, 271 (1976); Dye v. Cowan, 472 F.2d 1206, 1206-1207 n.1 (6th Cir. 1972); TPO, Inc. v. McMillen, 460 F.2d 348, 359 (7th Cir. 1972).

Finally, even if the district court possesses jurisdiction over bankruptcy adjudications and could constitutionally delegate this jurisdiction, the district court lacks statutory authority to confer such powers on this court. Although the administrative order adopting the emergency rule in this district is silent as to the statutory justification for the implementation of this rule, several commentators have suggested a number of sources to support promulgation of the rule. These include (1) the Judicial Council's power pursuant to 28 U.S.C. § 332(d) to make orders necessary for the administration of justice within each circuit, (2) the district court's authority to establish local rules under either 28 U.S.C. § 2071 or Bankruptcy Rule 927, (3) the district court's reference of matters to special masters pursuant to Federal Rule of Civil Procedure 59 or Bankruptcy Rule 513, (4) the district court's exercise of its statutory bankruptcy powers under 28 U.S.C. § 1334, and (5) the bankruptcy court's ability under 11 U.S.C. § 105 (West 1979) to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." None of these provisions, however, even indirectly purports to give either the Judicial Council or the district courts

themselves the power to create subject matter jurisdiction in bankruptcy courts.

The Judicial Council attempts to propound this emergency rule by virtue of 28 U.S.C.A. § 332(d) (West Supp. 1982), which provides in relevant part as follows:

> "(d)(1)Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit...
>
> (2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council."

Although the Supreme Court has observed in Chandler v. Judicial Council, 398 U.S. 74, 85 n.6 (1970), that "§ 332 is not a model of clarity in terms of the scope of the judicial councils' powers," § 332 certainly cannot stand for the proposition that the Judicial Council may confer subject matter jurisdiction upon an inferior federal court in direct contravention of the United States Constitution. Such an exercise of authority usurps the powers that the Constitution has placed solely in the legislative branch and goes well beyond the Judicial Council's primary role as supervisor and manager of the judicial work of the circuit. See Chandler v. Judicial Council, 398 U.S. at 86 n.7; Kohn, The Authority of the Circuit Judicial Councils: Separation of Powers in the Courts of Appeals, 5 Seton Hall L. Rev. 815, 826, 831-832 (1974); Address by United States District Judge John W. Oliver at the Annual Meeting of the National Conference of Federal Trial Judges, American Bar Association, Honolulu, Hawaii

(August, 1974), reprinted in 64 F.R.D. 201, 202-206.

Nor can this rule be implemented by the district courts as a local rule of court pursuant to either 28 U.S.C. § 2071 or Bankruptcy Rule 927.[13] The law is well settled that no federal court, not even the United States Supreme Court pursuant to its power under 28 U.S.C. § 2075 to prescribe rules in bankruptcy adjudications, may enlarge the statutory subject matter jurisdiction of federal courts. As the United States Supreme Court definitively explained in United States v. Sherwood, 312 U.S. 584, 589-590 (1941):

> "An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934..., authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts." (citations omitted).

Accord Nissho American Corp. v. Humphreys (In the Matter of Behring and Behring), 445 F.2d 1096, 1100 (5th Cir. 1971); Concord Casualty & Surety Co. v. United States, 69 F.2d 78, 80 (2d Cir. 1934); Clymer v. United States, 38 F.2d 581, 582 (10th Cir. 1930); Gillman v. Blue Cross and Blue Shield (In re Park East Corp.), 470 F.Supp. 147, 151 (S.D.N.Y. 1979); Johnson v. E.C. Ernst, Inc., 2 Bankr. 757, 760 (S.D.N.Y. 1980). This basic concept of jurisprudence is reaffirmed in the Supreme Court's enactment of Bankruptcy Rule 928, which expressly provides that "[T]hese rules shall not be construed to extend or limit the jurisdiction of courts of

bankruptcy over subject matter." Fed. R. Bankr. P. 928.

Furthermore, the district court's adoption of the emergency rule as a local rule would contravene the provisions of both 28 U.S.C. § 2071 and Bankruptcy Rule 927 which prohibit the implementation of any local rule which is inconsistent with the rules of practice and procedure prescribed by the Supreme Court. 28 U.S.C.A. § 2071 (West 1959); Fed. R. Bankr. P. 927. The emergency rule as formulated is inconsistent with several of the Rules of Bankruptcy Procedure adopted by the Supreme Court under 28 U.S.C. § 2075. These inconsistancies include, but are not limited to, the following: (1) the rule gives no deference to the findings of the bankruptcy judge whereas Bankruptcy Rules 752 and 810 specifically provide that the district court shall accept the bankruptcy court's findings of fact unless they are clearly erroneous, compare Adm. Order No. 28 (e)(2)(B) at 7 with Fed. R. Bankr. P. 752(a) & 810; (2) the rule's requirement that a bankruptcy judge must submit a proposed judgment or order to the district judge for approval in all related proceedings negates the provision in Bankruptcy Rule 921 that a bankruptcy judge's judgment becomes effective once entered, compare Adm. Order No. 28 (d)(3)(B), at 6 with Fed. R. Bankr. P. 921(a); and (3) the emergency rule's prohibition of jury trials in the bankruptcy court contravenes both Bankruptcy Rules 115(b) and 409(c) which permit either party to demand a trial by jury on any issue triable of right by a jury, compare Adm. Order No. 28 (d)(1)(D), at 4 with Fed. R. Bankr. P. 115(b) & 409(c).

The emergency rule also conflicts with express statutory provisions of the Bankruptcy Reform Act of 1978. For instance, the appellate process set forth in § 405(c), which was not affected by the Northern Pipeline decision, is drastically altered under the emergency rule, compare Adm. Order No. 28 (e), at 6-8 with § 405(c), 92 Stat. 2685, and the emergency rule's provision for automatic referral of all cases under Title 11 to the bankruptcy judges in this district is totally inconsistent with § 921(b) of the Code which provides that the chief judge of the court of appeals for the circuit embracing the district in which a municipal bankruptcy petition under Chapter 9 is commenced shall designate the bankruptcy judges to conduct the case, compare Adm. Order No. 28(c)(1), at 3 with 11 U.S.C.A. 921(c) (West 1979).

This court also rejects the proposition that the emergency rule can be validated as the mere referral of bankruptcy adjudications to bankruptcy judges who would serve as special masters to the district courts pursuant to either Federal Rule of Civil Procedure 59 or Federal Rule of Bankruptcy Procedure 513.[14] The case law discussing the appointment of a special master by a district judge conclusively reveals that the appointment of a master is the exception, not the rule, and that the court should only appoint a master to assist, not displace, the district judge in the performance of his duties. La Buy v. Howes Leather Co., 352 U.S. 249, 256-259 (1957); In the Matter of Peterson, 253 U.S. 300, 312-313 (1920); Bradshaw v. Thompson, 454 F.2d 75, 80 (6th Cir. 1972); 9 Wright & Miller, Federal Practice and Procedure § 2601, at 776-777 (1971).

Rule 53 itself contemplates that a reference to a master "shall be the exception and not the rule" and that "in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it." Fed. R. Civ. P. 53(b). These authorities are sufficient to demonstrate that the district courts cannot abdicate whatever subject matter jurisdiction they possess over bankruptcy cases and proceedings to "special master" bankruptcy judges.

Lastly, this court finds that neither 28 U.S.C. § 1334 nor 11 U.S.C. § 105 give even the slightest indication that Congress intended to imply in these general grants of power that a district court could delegate its subject matter jurisdiction to another federal tribunal. Section 1334 grants district courts jursidiction over "all matters and proceedings in bankruptcy." 28 U.S.C.A. § 1334 (West Supp. 1982). Section 1334 does not grant district courts the authority to delegate this jurisdiction to other federal courts. In any event, the emergency rule purports to grant bankruptcy courts jurisdiction over both Title 11 cases and all civil proceedings arising in or related to cases under Title 11. Adm. Order No. 28(c)(1), at 3. Section 1334 apparently provides district courts with no jurisdiction over Title 11 cases themselves and clearly provides the district courts with no jurisdiction over proceedings "arising in or related to" cases under Title 11.

As for § 105, the specific language of this

section confers power solely to the "bankruptcy court," not the district court. Furthermore, § 105 does not grant the bankruptcy court the authority to implement a rule but only allows the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." (emphasis added). 11 U.S.C.A. § 105 (West 1979). In any event, the general provisions of § 105 are insufficient to support a finding that Congress intended in § 105 to confer on district courts the power to delegate their entire subject matter jurisdiction over bankruptcy adjudications to other federal tribunals. Indeed, to accept this reasoning would allow the bankruptcy courts through this same grant to refer any and all bankruptcy adjudications to any person they so chose to designate.

In sum, this court finds that the Supreme Court's decision in Northern Pipeline left this court without any subject matter jurisdiction to hear any bankruptcy petition commenced after December 24, 1982, and that the adoption of the emergency rule by the United States District Court for Middle Tennessee is patently unconstitutional and cannot confer subject matter jurisdiction to this court.[15] A court lacking subject matter jurisdiction over a case or controversy has no alternative but to dismiss that case.[16] Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 514-515 (1869); Thomas v. James, 661 F.2d 67, 68 n.3 (5th Cir. 1981); Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1157 (5th Cir. 1981); International Video Corp. v. Ampex

Corp., 484 F.2d 634, 639 (9th Cir. 1973); Stewart v. United States, 199 F.2d 517, 519 (7th Cir. 1952); Trinanes v. Schulte, 311 F.Supp. 812, 813 (S.D.N.Y. 1970).

This court is aware that this decision will effectively leave debtors with no court in which to now file a petition under the Bankruptcy Reform Act. This court also realizes that its position in criticizing an administrative rule entered by those district judges who appointed them and promulgated by the Judicial Council which can remove them, places the court in an uncomfortable and even precarious posture. In light of these considerations, one respected and learned bankruptcy jurist has recently suggested that "it would be an act of judicial anarchy for this court not to follow a rule adopted unanimously by the judges of its appellate court" and "[d]isobedience of the rule would be a dereliction of duty." Docter v. Gleicher (In re Stillman), Case No. 81-1-0964, Adv. Proc. No. 82-0073A, slip op. at 7, 9 (Bankr. D. Md. January 13, 1983). However, this court, in recalling the oath taken when assuming office, feels compelled to follow the teachings of the United States Constitution as interpreted by the United States Supreme Court. The court therefore cannot condone the application of this administrative rule which it deems patently unconstitutional and in direct conflict with the rulings of the Supreme Court.

Accordingly, we conclude that this court possesses subject matter jurisdiction over only those Chapter 13

cases filed on or before December 24, 1982. As to those cases, the court ORDERS, ADJUDGES and DECREES that the trustee continue to distribute funds in accordance with the provisions of Chapter 13 of the Bankruptcy Reform Act of 1978. As for cases commenced subsequent to December 24, 1982, this court lacks subject matter jurisdiction and can therefore issue no order to compel the Chapter 13 trustee to distribute funds in or administer those cases.

IT IS, THEREFORE, SO ORDERED.

Entered this 26th day of January, 1983.

GEORGE C. PAINE, II
U.S. BANKRUPTCY JUDGE

KEITH M. LUNDIN
U.S. BANKRUPTCY JUDGE

cc: Henry E. Hildebrand, III, Esq.
Chapter 13 Trustee
Nashville, Tennessee

Marc McNamee, Esq.
Attorney for Commerce Union Bank
Nashville, Tennessee

Perry Happell, Esq.
Steve Norris, Esq.
L.C. Caroland, Esq.

[1]The immediacy of this controversy is clear. The Chapter 13 trustee in this district is currently holding in his debtors' accounts more than $500,000.00 which would normally have been distributed to creditors in pending confirmed cases during the first week of January. The trustee's bonding company was not willing to insure the January distribution without court review of the jurisdictional problem. New Chapter 13 cases are being filed at the rate of approximately 20 per week. The trustee now seeks a declaration regarding jurisdiction pursuant to 28 U.S.C. § 2201 before he incurs the substantial expenses involved in administering both pending and future cases.

[2]Section 241(a) of the Bankruptcy Reform Act of 1978 added, among other provisions, § 1471 to Chapter 28 of the United States Code. Section 241(a), 92 Stat. 2668-2669 (1980). 28 U.S.C.A. § 1471 (West 1979) defines the jurisdiction of courts of bankruptcy as follows:

> "(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district court shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.
>
> (d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such absention, or a decision not to abstain, is not reviewable by appeal or otherwise.
>
> (e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case."

[3]U.S. Const. art. III, § 1 provides as follows:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

[4]U.S. Const. art. I, § 8, cl. 9 provides that Congress shall have the power "[T]o constitute tribunals inferior to the supreme Court."

[5]To this date, this court is aware of at least three decisions which have addressed this issue. Both District Judge Robert E. DeMascio of the Eastern District of Michigan and Bankruptcy Judge Paul Mannes for the District of Maryland have upheld the emergency rule as constitutional and therefore have found that the rule as adopted could confer subject matter jurisdiction on the bankruptcy courts. Prudential Insurance Co. v. Stouffer Corp. (In the Matter of Northland Point Partners), Case No. 82-05387-W, Adv. No. 82-2277-W & 82-2332-W (E.D. Mich. January 7, 1983); Docter v. Gleicher (In re Stillman), Case No. 81-1-0964, Adv. Pro. No. 82-0073A (Bankr. D. Md. January 13, 1983). Bankruptcy Judge Charles A. Anderson of the Southern District of Ohio has, however, concluded that "neither the Bankruptcy Courts nor the District Courts are vested with jurisdiction over the litigation of state law causes of action involving nondebtors in a bankruptcy court unless conferred by a jurisdictional statute enacted by the Congress to supplant 28 U.S.C. § 1471 or the jurisdiction conferred upon the District Court by other statutes." Winters National Bank & Trust Co. v. Schear Group (In the Matter of Schear Realty & Investment Co.), Case No. 3-82-01843, Adv. No. 3-82-0491, slip op. at 17 (Bankr. S.D. Ohio December 27, 1982).

[6]This court has concluded that the Supreme Court's decision to apply Northern Pipeline prospectively requires this court to continue to exercise § 1471 jurisdiction over any matters or proceedings arising from cases commenced on or prior to December 24, 1982. Walter E. Heller & Co. v. Matlock Trailer Corp., Case No. 382-02278, Adv. Proc. No. 382-0755 (Bankr. M.D. Tenn. January 26, 1983.)

[7]The Bankruptcy Reform Act was to be phased in during the transition period which extends from October 1, 1979, through March 31, 1984. § 404(b), 92 Stat. 2683.

[8]Justice Brennan, writing for the plurality, explained:

> "Appellants and Justice WHITE's dissent also rely on the broad powers exercised by the

bankruptcy referees immediately before the Bankruptcy Act of 1978...But those particular adjunct functions, which represent the culmination of years of gradual expansion of the power and authority of the bankruptcy referee...have never been explicitly endorsed by this Court." (citations omitted).

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. at 2876 n. 31.

[9]Section 404(a) provides that the "courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act, created under section 2a of the Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act." § 404(a), 92 Stat. 2683. Section 1(10) [11 U.S.C. § 1 (repealed 1978)] specifically states that "'[C]ourts of bankruptcy' shall include the United States district courts."

[10]For all of these reasons, this court cannot accept Judge DeMascio's interpretation that Congress "purposely included" § 1334 "to satisfy its stated concern over the constitutionality of the broad jurisdictional grant afforded to bankruptcy judges under the act." Prudential Insurance Co. v. Stouffer Corp. (In the Matter of Northland Point Partners), Case No. 82-05387-W, Adv. Nos. 82-227-W & 82-2332-W, slip op. at 2. Not only is the legislative history completely devoid of any explanation as to why Congress left § 1334 entact during the transition period, but this court finds it incredible to assume that Congress, without ever directly mentioning the fact, left § 1334 in place with the knowing and willing presupposition that § 1334 would provide a safety valve measure when § 241(a) was found unconstitutional. This assumption is especially unlikely in view of Congress' decision to repeal § 1334 on April 1, 1984. If Congress actually intended § 1334 to be a stop gap device, then § 1334 would not have been repealed. This interpretation simply reads too much into the Congressional concern over the constitutionality of the Bankruptcy Reform Act. In any event, Judge DeMascio's analysis is in direct contravention with § 405(b) which makes § 241(a) the exclusive basis of jurisdiction for all courts of bankruptcy, including the district courts, during the transition period. See § 405(b), 92 Stat. 2685.

[11]The court suggests that, if § 1334 was still viable, the outcome in Northern Pipeline would have been completely different. The Suprme Court's entire discussion of § 241(a) would necessarily have included an analysis of the ramifications of § 1334. Indeed, instead of affirming the district court's opinion dismissing the case,

the Court would have remanded the case to the district court for trial as a "matter or proceeding" within the district court's § 1334 jurisdiction or, at least, remanded the case to the district court to determine if jurisdiction existed under § 1334. See Marathon Pipeline Co. v. Northern Pipeline Construction Co., 12 Bankr. 946 (D. Minn. 1981), aff'd 102 S.Ct. 2858.

[12]Related proceedings do not include the following:

> "...contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyance; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law." (emphasis added).

Adm. Order No. 28 (d)(3)(A), at 5.

[13]28 U.S.C.A. § 2071 (Law. Co-op. 1977) provides:

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Fed. R. Bankr. P. 927 provides in relevant part as follows:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing practice and procedure under the Act not inconsistent with these rules....In all cases not provided for by rule, the district court may regulate its practice in any manner not inconsistent with these rules."

[14]Fed. R. Civ. P. 53 provides in pertinent part:

"(a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word 'master' includes a referee, an auditor, an examiner, a commissioner, and an assessor...

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."

Fed. R. Bankr. P. 513 provides:

"If a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply."

[15]Even if this court were to find that the district courts could constitutionally promulgate a rule conferring jurisdiction upon the bankruptcy courts, the fact that the emergency rule could be divergently applied in the various district courts might very well cause the rule to be violative of the constitutional requirement that Congress shall adopt uniform national bankruptcy laws. U.S. Const. art. I, § 8, cl. 4. See also Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902); Blanchette v. Connecticut General Insurance Corps. (In re Regional Rail Reorganization Act Cases), 419 U.S. 102, 160 (1974). Indeed, a recent publication indicated that, of the two model rules suggested by the Judicial Conference, numerous courts have adopted one or the other and several courts have modified or refined one of the two model rules. "Courts Adopt Interim Bankruptcy Rules," 15 The Third Branch 1 (January 1983).

[16]Although Bankruptcy rule 915(a) does require a party to file an objection to jurisdiction by a timely motion or answer, this provision is inapplicable to motions to dismiss for lack of subject matter jurisdiction since such an objection may be raised at any time. See, e.g., Driscoll v. New Orleans Steamboat Co., 633 F.2d 1158, 1161 (5th Cir. 1981); Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426, 430 n.5 (9th Cir. 1978); Mortensen v. First Federal Savings and Loan Association,

549 F.2d 884, 891-892 (3rd Cir. 1977); United States v. Mississippi Valley Barge Line Co., 285 F.2d 381, 387 (8th Cir. 1960); In re Dreske Greenway Trust, 14 Bankr. 618, 619 (Bankr. E.D. Wis. 1981); 5 Wright & Miller, Federal Practice and Procedure § 1350, at 544 (1969). Rule 915 in fact contemplates such a result. Rule 915 is by its terms subject to the provisions of Bankruptcy Rule 928, which expressly provides that "[T]hese rules shall not be construed to extend or limit the jurisdiction of courts of bankruptcy over subject matter." Fed. R. Bankr. P. 928.

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DEC 24 1982

CLERK
BY L. Gaston
DEPUTY CLERK

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

IN RE: ADMINISTRATION OF THE BANKRUPTCY SYSTEM

ADM. ORDER NO. 28

Nashville Gen. Docket 28
Northeastern Gen. Doc. 5
Columbia Gen. Doc. 5

ORDER

The following rule is hereby adopted by the United States District Court for the Middle District of Tennessee:

RULE

(a) Emergency Resolution

The purpose of this rule is to convey to the bankruptcy judges of this district authority to act in bankruptcy cases and proceedings until the Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line, Co., _____ U.S. _____, 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

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he judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public Law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the district courts' assuming the existing bankruptcy caseload on short notice.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

(b) Filing of bankruptcy papers

The bankruptcy court constituted by § 404 of the Public Law 95-598 shall continue to be known as the United States Bankrupty Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the

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district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

c. Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

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(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

d. Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt--

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (d)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

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(3) (A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyance; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

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(B) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

(e) District Court Review

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or oder. As modified by sections (e) 2A and B of this rule, the procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

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(2) (A) A district judge shall review:

(i) an order or judgment entered under paragraph (d)(2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (d)(2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (d)(3), whether or not any notice of appeal or application for leave to appeal has been filed.

(B) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

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(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph (d)(2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order of judgment of the district judge after review.

(f) Local Rules

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

(g) Bankruptcy Rules and Title IV of Public Law 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. § 2075 and limited by SEC. 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with the holding of Northern

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Pipeline Construction Co. v. Marathon Pipe Line Co., ____U.S. _____, 102 S. Ct. 2858 (1982).

(h) Effective Date and Pending Cases

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982, shall be deemed referred to that judge.

It is so ORDERED.

L. CLURE MORTON
CHIEF U. S. DISTRICT JUDGE

THOMAS A. WISEMAN, JR.
U. S. DISTRICT JUDGE

JOHN T. NIXON
U. S. DISTRICT JUDGE

DEC 24 1982

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE

IN RE:	
MATLOCK TRAILER CORPORATION,	BK. NO. 382-02778
Debtor,	
WALTER E. HELLER AND COMPANY, SOUTHEAST, INC.,	
Plaintiff,	
VS.	ADV. NO. 382-0755
MATLOCK TRAILER CORPORATION,	
Defendant.	
IN RE:	
CUMBERLAND ENTERPRISES, INC.,	BK. NO. 381-01797
NORTHEAST ENTERPRISES. INC.,	BK. NO. 381-00758
NORTHEAST ENTERPRISES OF COLUMBUS, INC.,	BK. NO. 381-00757
Debtors,	
T. LARRY EDMONDSON, TRUSTEE, in Bankruptcy for CUMBERLAND ENTERPRISES, INC., NORTHEAST ENTERPRISES, INC., NORTHEAST ENTERPRISES OF COLUMBUS, INC., and on behalf of himself as sole stockholder of THE 1727 CORPORATION,	
Plaintiff,	
VS.	ADV. NO. 382-0289
2-STAR FOODS, INC., THE CHIPPER FOODS, CO., INC., GULF COAST FOODS, INC., LEON MOORE, MOORE & ASSOCIATES, INC., VENTURE ENTERPRISES. INC., SHONEY'S, INC., DAVID WACHTEL, WILLIAM TELL, INC., WILSON C. TATE, SR., HAROLD F. MORRIS, MARK R. MOORE, CHARLES COX, JR., TATE, COX & MOORE, A Partnership, SEQUEL II CORPORATION, JAMES C. SMITH, SEAFOOD DISTRIBUTORS,	
Defendants.	

MEMORANDUM AND ORDER

These matters are before the court on motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 915 of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(1) of the Federal Rules of Civil Procedure made applicable to bankruptcy proceedings by Bankruptcy Rule 712(b). Because the issues presented by the motions in these cases are identical, the matters were consolidated for hearing and opinion. The movants argue that the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ____ U.S. ____, 102 S.Ct. 2858 (1982) ("Northern Pipeline") removed this court's authority to adjudicate bankruptcy matters after December 24, 1982. Upon consideration of the briefs submitted, argument of counsel, and the entire record, the court is of the opinion that it retains § 241(a) jurisdiction to adjudicate all bankruptcy cases[1] filed prior to December 24, 1982, including all adversary proceedings and related matters relevant to those cases, whenever filed. The motions to dismiss are therefore DENIED.

The defendant/debtor Matlock Trailer Corporation ("Matlock") manufactures, sells, leases and services commercial truck bodies and semi-trailers at a facility located in Nashville, Tennessee. Matlock employs more than 60 individuals earning an aggregate payroll in excess of $78,000 per month. On August 27, 1982, Matlock filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Matlock sought to reorganize its debts because its immediate expense obligations exceeded its current revenues, although its total assets exceeded liabilities by approximately two million dollars.

---

[1] In referring to "bankruptcy cases," the court means all bankruptcy petitions, voluntary and involuntary, filed under Title 11 U.S.C.A. § 101 et seq. (West 1979).

The plaintiff/creditor Walter E. Heller and Company Southeast, Inc. ("Heller") is a major commercial lender from whom Matlock obtained approximately $750,000 in operating funds in December, 1981. To secure this loan, Heller took a security interest in Matlock's raw materials, work-in-progress, inventories and the real estate upon which Matlock's facility is located. The total value of the collateral is approximately $1.7 million.

As a result of the filing of the bankruptcy petition, all actions by creditors such as Heller to collect debts from Matlock or levy against its property were stayed as a matter of law. See 11 U.S.C.A. § 362(a) (West 1979). On November 8, 1982, Heller filed a complaint seeking to terminate the automatic stay and to obtain other appropriate relief, alleging in essence that its secured position was not adequately protected and that Matlock could not be successfully reorganized. See 11 U.S.C.A. § 362(d) (West 1979). Heller also filed a motion to convert the Chapter 11 case to one under Chapter 7, to appoint a trustee, or, in the alternative, to dismiss the petition because of the alleged inability of Matlock to reorganize. Matlock timely responded to Heller's complaint and motion, denying the factual assertions and legal positions contained therein.

Heller's complaint for relief from the automatic stay was heard at a preliminary hearing and pretrial conference on December 8, 1982. At that time counsel announced that the parties had tentatively agreed on a settlement and that an agreement would be entered, subject to court approval, following an opportunity for interested parties to be heard. The parties agreed that a hearing on the settlement would be set at a date future, that the preliminary hearing on relief from the automatic stay would be consolidated with the final hearing, and that the automatic stay would continue in the interim. The settlement, however,

was never consummated and an agreed order was entered on December 23, 1982, formally setting the final hearing for January 6, 1983, and continuing the automatic stay "pending further order of this court." This order was not appealed by either party.

At the scheduled hearing, counsel for Heller advised the court that he had filed a motion to dismiss the Chapter 11 proceeding for lack of subject matter jurisdiction in this court as well as in the district court. He also filed a motion to dissolve the automatic stay for want of jurisdiction. In order to hear the jurisdiction motions before a possibly unnecessary final hearing on the merits and to allow the parties leave to file briefs on the issues, the stay proceeding was continued until after argument on the jurisdiction motions on January 19, 1983.

On May 12, 1980, Cumberland Enterprises, Inc. filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Southern District of Indiana. On May 24, 1980, Northeast Enterprises, Inc. and Northeast Enterprises of Columbus, Inc. filed Chapter 7 petitions with the United States Bankruptcy Court for the Southern District of Ohio. On May 5, 1981, the United States Bankruptcy Court for the Southern District of Indiana transferred the Cumberland Enterprises, Inc. case to the United States Bankruptcy Court for the Middle District of Tennessee. On February 1, 1982, the United States Bankruptcy Court for the Southern District of Ohio transferred the Northeast Enterprises, Inc. and Northeast Enterprises of Columbia, Inc. cases to the United States Bankruptcy Court for the Middle District of Tennessee. On April 12, 1982, this court ordered the consolidation of the cases of Cumberland Enterprises, Inc., Northeast Enterprises, Inc., and Northeast Enterprises of Columbus, Inc. A trustee was subsequently appointed to administer the estate.

On May 11, 1982, the trustee filed a complaint against a number of defendants alleging conversion of assets, preferential transfers, fraudulent

conveyances, and seeking the subordination of all claims held by the defendants. The trustee asserted jurisdiction pursuant to 28 U.S.C.A. §§ 1471 and 1481 (West Supp. 1982), as well as 11 U.S.C.A. § 105 (West 1979). Several of the defendants, including Chipper Foods Co., Inc., moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to Rule 915 of the Bankruptcy Rules and Rule 12(b) of the Federal Rules of Civil Procedure. On August 18, 1982, this court issued a memorandum and order denying defendants' motions and noting jurisdiction to act during the pendency of the Northern Pipeline stay pursuant to 28 U.S.C.A. § 1471 (West Supp. 1982). Schneider v. 2-Star Foods, Inc. (In re Cumberland Enterprises), 22 Bankr. 626 (Bankr. M.D. Tenn. 1982). The order was issued without prejudice to the defendants' right to raise the jurisdictional issue after the stay expired. Defendant Chipper Foods Co., Inc. has subsequently renewed its objection to jurisdiction. For the purpose of resolving the jurisdictional question, this motion was consolidated with the Matlock matter.

Although this court's jurisdiction under the Bankruptcy Reform Act as conferred through 28 U.S.C.A. § 1471 (West Supp. 1982) was declared unconstitutional in Northern Pipeline, the Supreme Court applied its holding prospectively and did not intend the decision to impact cases filed in reliance on the presumed validity of the Bankruptcy Code. The plurality stated that:

> Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in § 241(a) is unconstitutional, we must now determine whether our holding should be applied retroactively to the effective date of the Act. Our decision in Chevron Oil Co. v. Huson, 404 US 97, 30 L Ed 2d 296, 92 S Ct 349 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are first, whether the holding in question 'decid[ed] an issue of first impression whose resolution was not clearly foreshadowed' by earlier cases, id., at 106, 30 L Ed 2d 296, 92 S Ct 349; second, 'whether retrospective operation will further or retard [the] operation' of the holding in question, id., at 197, 30 L Ed 2d 296, 92 S Ct

> 349; and third, whether retroactive application 'could produce substantial inequitable results' in individual cases. ibid. In the present case, all of these considerations militate against the retroactive application of our holding today. It is plain that Congress' broad grant of judicial power to non-Art III bankruptcy judges presents an unprec[illegible]ented question of interpretation of Art III. It is equally plain that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. We hold, therefore, that our decision today shall apply only prospectively. (emphasis added and footnotes omitted).

102 S.Ct. at 2880. Justices Rehnquist and O'Connor concurred in the application of prospectivity. 102 S.Ct. at 2882. (Rehnquist, J. and O'Connor, J., concurring).

The prospectivity of the Court's opinion was based on the Court's insightful conclusion that application to pending cases would cause irreparable hardship to creditors and debtors alike. It is a well-settled principle that where a decision could produce substantial inequitable results if applied to all cases, there is an ample basis for making the decision prospective only in nature. Cipriano v. Houma, 392 U.S. 701 (1969); Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). The prospective application of judicial decisions has been most conspicuously observed in the area of criminal procedure. See, e.g., Hill v. California, 401 U.S. 797 (1971) (constitutional standards for search incident to arrest); Foster v. California, 394 U.S. 440 (1969) (constitutionally required counsel at lineups); Linkletter v. Walker, 381 U.S. 618 (1965) (constitutional restrictions on search and seizure). However, the Court has recognized the doctrine of prospectivity outside the criminal area many times. See, e.g., Cipriano v. Houma, 395 U.S. 701 (1969) (elections); Allen v. Board of Elections, 393 U.S. 544 (1969) (elections); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) (issuance of bonds). One clear indication from these decisions is that "prospective" has no single meaning. The

circumstances of each particular case must be analyzed to determine what is meant by a "prospective application." As the Court has noted: "We must weigh the merits and demerits in each case by looking to the prior rule in question, its purpose and effect, and whether retrospective application will further or retard its operation." Linkletter v. Walker, 381 U.S. 618, 629 (1965) (emphasis added).

The prospective nature of the Court's decision in Northern Pipeline must be interpreted and applied to five categories of cases: (1) bankruptcy cases filed under the Bankruptcy Reform Act, completed and closed before June 28, 1982; (2) bankruptcy cases filed after June 28, 1982, but completed and closed before December 24, 1982; (3) bankruptcy cases which are uncompleted because of unresolved matters or proceedings filed prior to June 28, 1982; (4) bankruptcy cases which are uncompleted because of unresolved matters or proceedings filed between June 28, 1982 and December 24, 1982; and (5) uncompleted bankruptcy cases that require adjudication of matters or proceedings filed after December 24, 1982. The court finds that in Northern Pipeline the Court intended bankruptcy courts to continue to exercise complete jurisdiction over all five categories of cases.

CATEGORIES 1 AND 2

The Court clearly intended all bankruptcy court orders and decisions entered prior to December 24, 1982, the effective date of Northern Pipeline, to be immune from collateral attack. The Court has repeatedly sanctioned actions taken even under unconstitutional authorization when making prospective application of their decisions. See Buckley v. Valeo, 424 U.S. 1 (1976); Georgia v. United States, 411 U.S. 526 (1973); Fortson v. Morris, 385 U.S. 231 (1966); Maryland Commission v. Tawes, 377 U.S. 656 (1964). The Court has sought to protect the reliance interest of those parties who have taken actions pursuant to

the presumed validity of an act of Congress. Thousands of litigants relied on the constitutional validity of the Bankruptcy Reform Act prior to the Court's unprecedented interpretation of Article III in Northern Pipeline. Reliance on the continued viability of the bankruptcy system was no less significant after the Court's announcement of Northern Pipeline. Debtors filing bankruptcy petitions and parties filing adversary proceedings relied on the prospective language of Northern Pipeline itself, the Court's stay of their judgment[2] and the subsequent extension of the stay, the Court's reaffirmation of the prospective nature of their decision in United States v. Security Industrial Bank, ____ U.S. ____, 74 L.Ed.2d 235, 240 n.5 (1982)[3] and the numerous judicial interpretations by bankruptcy courts, including a decision by this court, that § 241(a) jurisdiction was retained during the interim period. See Schneider v. 2-Star Foods, Inc. (In

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[2]In staying their judgment, the Court noted that "[t]his limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy law." 102 S.Ct. at 2880. The stay of judgment is clearly distinguishable in effect and intention from the prospective application of the declaration of unconstitutionality of § 241(a). The stay was designed to allow Congress an opportunity to remedy the constitutional infirmities identified in Northern Pipeline. By applying the holding prospectively, the Court was acknowledging the peculiar nature and length of bankruptcy cases. The Court was obviously aware that an immediate application of its decision would leave a debtor no forum in which to complete a pending bankruptcy. The prospect of such an alternative would create an unacceptable void in a time of intense economic dislocation. There is certainly no evidence that the Court intended the stay to merely provide a grace period within which parties would have to complete their bankruptcy cases. It would be unrealistic to place such time parameters on a bankruptcy case. The ongoing nature of a bankruptcy case, particularly in the areas of Chapter 11 and Chapter 13, requires a significant gap period between the filing of a petition and a final order closing the case.

[3]The Court noted in United States v. Security Industrial Bank that "[b]ecause our decision in Northern Pipeline is prospective only . . . and because we have stayed the issuance of our mandate in that case to December 24, 1982 . . . that decision does not affect the judgment in this case." ____ U.S. ____, 74 L.Ed.2d 235, 240 n.5 (1982).

re Cumberland Enterprises), 22 Bankr. 626 (Bankr. M.D. Tenn. 1982).[4] See also Armco, Inc. v. Cherry Pond Coal Co., 21 Bankr. 592 (S.D. W. Va. 1982), rev'g 21 Bankr. 588 (Bankr. S.D. W. Va. 1982); Zinker v. Levy (In re M.J.S. Apparel, Inc.), 22 Bankr. 737 (Bankr. E.D. N.Y. 1982); National Sugar Refining Co. v. U.S. Brands Corp., 22 Bankr. 279 (Bankr. S.D. N.Y. 1982); Hassett v. Ganz (In re O.P.M. Leasing Services, Inc.), 21 Bankr. 986 (Bankr. S.D. N.Y. 1982); Otero Mills, Inc. v. Security Bank & Trust, 21 Bankr. 645 (Bankr. D. N.M. 1982). The Court intended to protect this reliance interest and the rights of all those parties who went through the bankruptcy process prior to December 24. Northern Pipeline cannot be interpreted to undo the actions which have been taken in the years since the passage of the Bankruptcy Reform Act. The rights of these parties have vested thus requiring that the status quo be maintained and these orders not be overturned.

CATEGORIES 3, 4 AND 5

While this court does not presently address the issue of whether jurisdiction exists to entertain bankruptcy cases filed after December 24, the only reasonable interpretation to be given to the prospective language of the Court's decision is that bankruptcy courts should continue to complete those cases, matters and proceedings which were filed on or before the effective date of Northern Pipeline. As a necessary corollary, this court must also continue to have jurisdiction over matters and proceedings which are filed after December 24, 1982 within cases commenced before that date.

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[4]This court did not address the questions raised by the instant motions in Cumberland Enterprises. The court merely decided the issue of whether it possessed jurisdiction to act during the Court imposed stay, and did not determine whether the court retained jurisdiction to complete cases filed prior to Northern Pipeline or filed during the pendency of the stay. This court's determination of jurisdiction during the stay was subsequently supported by the Supreme Court's decision in United States v. Security Industrial Bank. (See note 3, supra).

In applying rulings "prospectively" in the criminal area, the Court has often allowed cases to continue despite constitutional questions and infirmities concerning underlying issues. For example, in United States v. Williams, 401 U.S. 646 (1971), the court emphasized that their decision in Chimel v. California, 395 U.S. 752 (1969), which altered a series of opinions relevant to searches incident to arrest, would not be applied to searches conducted prior to June 23, 1969. The Court noted that "the Chimel rule will receive sufficient implementation by applying it to those cases involving the admissibility of evidence seized in searches occurring after Chimel was announced." 401 U.S. 646 at 656. Rather than distinguishing between cases which were awaiting trial and those which were on review or appeal, the Court elected to restrict their opinion to those acts occurring after the opinion was announced. See also Foster v. California, 394 U.S. 440 (1969) (decision in United States v. Wade, 388 U.S. 218 (1967) would not invalidate lineups conducted prior to the effective date of the opinion). In these cases, law enforcement officials had reasonably relied on the constitutionality of their actions and the Court determined that this reliance should not be prejudiced by having a case dismissed or interrupted in midtrial by an unanticipated construction of the Constitution by the Supreme Court. Cases involving constitutionally tainted searches and lineups were, thus, allowed to proceed on the theory that justice is better served when cases begun in reliance on a particular constitutional interpretation are allowed to continue to completion.[5]

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[5]In applying principles of prospectivity to their decision holding portions of the Industrial Loan and Thrift Companies Act unconstitutional, the Tennessee Supreme Court has similarly considered the issues of fairness and public policy and applied federal precedents to sanction the legitimacy of notes and obligations incurred under the Act, as well as suits to enforce those obligations, and to "apply the new rule to the case at bar, but prospectively to all present or future litigants." Cumberland Capitol Corp. v. Patty, 556 S.W.2d 516, 542 (Tenn. 1977).

A similar (if not more compelling) interest is certainly served by allowing bankruptcy cases filed prior to December 24 to be completed. Litigants' reliance on the continued viability of the bankruptcy system is no less reasonable and no less deserving of protection than the actions of police officers sanctioned by the Court in Williams, Foster and other cases making prospective applications of newly-announced law. Only continued jurisdiction over filed bankruptcy cases gives meaning and effect to the Court's concern for fairness, equity and the prevention of hardship which motivated their decision to apply Northern Pipeline prospectively. Any other holding would create an inequitable travesty. Litigants would be treated differently based solely on the date a particular proceeding was completed.

For example, if two Chapter 7 debtors filed their cases on the same day and the clerk's office set the first for a discharge hearing on December 23, 1982 and the other for December 27, 1982, the cases might have entirely different outcomes although both debtors filed in full reliance on the constitutionality of the Bankruptcy Reform Act. The debtor who received the discharge on December 23, 1982 would realize the protection intended by the Bankruptcy Code. Similarly, all creditors would have their rights adjudicated under the same provisions. Absent the prospective application of Northern Pipeline, the second debtor whose case was not completed until December 27, 1982, would not receive a valid order of discharge solely by the passage of a single day and by events completely beyond his control.

Another example involves litigants who filed and tried a Northern Pipeline style adversary proceeding prior to December 24, 1982 (or prior to June 28, 1982), but part of the case was taken under advisement until December 27, 1982. The portion of the case decided at trial would be a valid judgment, despite being acted upon by a bankruptcy court. The remaining issues, although resolved by the same court, would be without the validity of a court order because they

were decided after the effective date of Northern Pipeline. The litigants involved would be severely impacted solely by the bankruptcy court's delay in the release of its opinion. Part of the issues would be res judicata while the remaining questions would be unresolved if not unresolvable.

Perhaps the best example of inequity is before this court in one of the instant cases. If the court had required the parties in Matlock to proceed to trial at the preliminary hearing rather than continuing the hearing because of an alleged agreement, and Matlock had prevailed, (and the facts certainly indicate a reasonable likelihood of that result), then that judgment would be accorded the full protection of the bankruptcy laws and Matlock's reorganization would continue with the 60 jobs of its employees along with their monthly payroll remaining intact. An altogether different outcome would occur if Heller had agreed at the preliminary hearing that Matlock had "a reasonable likelihood" of prevailing at the final hearing and the matter continued until a date after the Northern Pipeline stay was lifted. Then under Heller's reasoning, no court would have jurisdiction to lift the stay and it would automatically terminate 30 days from December 8 pursuant to 11 U.S.C.A. § 362(e) (West 1979). Matlock would, thus, be out of business (and 60 jobs lost) merely because of the scheduling of the final hearing.

Certainly the Court did not envision that the numerous litigants who filed cases on or before December 24, 1982, who all relied on the presumed constitutionality of an act of Congress, should have their rights treated differently as a result of Northern Pipeline. There is absolutely nothing in the Northern Pipeline opinion to indicate that the Court intended to promote a "race to judgment" so that parties who received judgments prior to December 24 would be protected and those whose cases could not be accommodated by the court's schedule or were taken under advisement would be prejudiced.

Finally, if the movants' interpretation of "prospective" is accepted, the administration of all bankruptcy cases would come to a grinding halt. Movants contend that the Supreme Court's "prospectivity" holding protects only orders of the bankruptcy court which become final before December 24 and does not permit the bankruptcy court to complete cases still pending on that date. By this analysis, the bankruptcy courts in the United States would have pending on their dockets some 700,000 cases filed before the effective date of Northern Pipeline. but would be without jurisdiction to enter orders to bring the cases to completion. The practical effect is to reduce bankruptcy to a meaningless concept. Parties, such as those in the instant cases, would be unable to obtain relief because the automatic stay was activated in a period of undisputed jurisdiction, yet now the court is without jurisdiction to enter an order to modify or dissolve the stay. Similarly, the court would be without authority to enter discharges, order the turnover of property, appoint a trustee, determine the dischargeability of debts, approve plans of reorganization, or perform any other number of necessary functions. Bankruptcy cases pending before this court would disappear with consequent unimaginable waste and prejudice to the parties involved if this court accepted movants' argument that prospectivity is limited to orders entered before December 24, 1982. Only a continuous adjudication of these cases by the bankruptcy courts can protect the rights of all the parties involved.

The parade of inequities occasioned by the movants' attempt to circumscribe the prospective nature of Northern Pipeline could be traced ad nauseum through an endless series of combinations and permutations. However, it is clear that movants' interpretation of the term "prospective" is blatantly inconsistent with the Supreme Court's express concern for injustice and hardship and would eviscerate the purpose behind the Court's prospective application. In

order to accord deference to the Court's concerns for justice to litigants, this court is required to reject the movants' interpretation of "prospective application."

In anticipation of the failure of the United States House of Representatives and the United States Senate to act in accordance with Northern Pipeline and the refusal of the United States Supreme Court to extend its stay, the Judicial Conference of the United States requested the Director of the Administrative Office of the United States Courts to provide each circuit with a proposed rule to permit the bankruptcy system to continue without disruption. Judicial Conference Resolution (September 23, 1982). The director, William E. Foley, then provided proposed rules drafted within the United States Court of Appeals for the Ninth Circuit. See, e.g., Docter v. Gleicher (In re Stillman), Case No. 81-1-0964, Adv. Proc. No. 82-0073A slip op. at 7 (Bankr. D. Md. Jan. 13, 1982); De Concini Hearing, National Conference on the Resolution of the Bankruptcy Crisis, Washington, D.C., January 7, 1983; Letters from William E. Foley (September 27 and December 3, 1982) (discussing proposed rule). Subsequently, the Judicial Council for the United States Court of Appeals for the Sixth Circuit promulgated an "emergency rule" which was adopted by the United States District Court for the Middle District of Tennessee as Administrative Order No. 28 on December 24, 1982. The Administrative Order provides that:

> (h) Effective Date and Pending Cases
>
> This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982, shall be deemed referred to that judge.

In re Administration of the Bankruptcy System, Adm. Order No. 28 at 9 (M.D. Tenn. Dec. 24, 1982).

The emergency rule and the section quoted were drafted on the inaccurate assumption that this court's jurisdiction over pending bankruptcy

cases was diminished effective December 24. The prospective nature of Northern Pipeline preserves § 1471 jurisdiction and, therefore, bankruptcy courts are vested with exclusive jurisdiction over all bankruptcy cases filed prior to December 24. This court continues to act in pre-December 24 cases based on its independent statutory grant of jurisdiction without reliance on any attempt to transfer authority from the district court to the bankruptcy court. Accordingly, the "emergency rule" is not applicable in bankruptcy cases filed prior to the effective date of Northern Pipeline. The emergency procedures for case adjudication requiring referral and review by the district court are unnecessary and are contrary to the exclusive jurisdiction provided to bankruptcy courts by 28 U.S.C.A. § 1471 (West Supp. 1982). The court does not presently address the constitutionality and applicability of the emergency rule to cases filed after December 24.

Accordingly, movants' motions to dismiss for lack of subject matter jurisdiction are DENIED and the consolidated final hearing in Matlock is hereby reset for the 8th day of March, 1983 at 1:00 p.m. in Room 216, Customs House, 701 Broadway, Nashville, Tennessee.

IT IS SO ORDERED.

Entered this 26th day of January, 1983.

George C. Paine II

GEORGE C. PAINE, II
U.S. BANKRUPTCY JUDGE

Keith M. Lundin

KEITH M. LUNDIN
U.S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re

No. 1-80-02516

JORGES CARPET MILLS, INC.

Debtor

C. KENNETH STILL, TRUSTEE

Plaintiff

v.

Adv. Proc. No.
1-82-0638

FIRST BANK OF NEWTON, KANSAS
ROSSVILLE BANK

Defendants

MEMORANDUM

APPEARANCES: Thomas S. Kale, Spears, Moore, Rebman & Williams, Chattanooga, Tennessee, Attorney for Plaintiff, C. Kenneth Still
Jim Golden, Leitner, Warner, Owens, Moffitt, Williams & Dooley, Chattanooga, Tennessee; Robert C. Foulston and Gary L. Ayers, Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, Attorneys for Defendant, First Bank of Newton
Richard B. Gossett, Thomas, Mann & Gossett, Chattanooga, Tennessee, Attorney for Defendant, Rossville Bank

RALPH H. KELLEY, UNITED STATES BANKRUPTCY JUDGE

The trustee in bankruptcy for Jorges Carpet Mills brought this suit against, among others, the First Bank of Newton, Kansas, to recover from it a preferential or fraudulent transfer in the amount of $400,000.

The bank has filed a motion to dismiss or stay this proceeding or at least to transfer it to the bankruptcy court in Kansas. The bank has made several arguments in support of its motion. More than one of the arguments focuses on the jurisdictional problem resulting from the Supreme Court's decision in Northern Pipeline Construction Company v. Marathon Pipe Line Company, --U.S.--, 102 S.Ct. 2858, 73 L.Ed.2d 598, 9 B.C.D.67, 6 C.B.C.2d 785, (1982).

As a practical matter, it would be unwise for the court to address the bank's other contentions while jurisdiction is still in doubt. Any decision on the other issues might be void for lack of jurisdiction.

In the Northern case, the Supreme Court ruled that the bankruptcy courts could not exercise the subject matter jurisdiction given them by 28 U.S.C. §1471, which was enacted as part of the Bankruptcy Reform Act of 1978. Pub.L.No. 95-598, §241(a) & §§404(a) & 405(b). The Supreme Court's ruling applied to all the jurisdiction of the bankruptcy courts under §241(a) of the 1978 Act.[1]

If the ruling had taken effect immediately, severe problems were likely to result. The Supreme Court concluded that the best way to deal with the problems that might arise was to delay the effect of its ruling so that Congress would have an opportunity to pass curative legislation. The Supreme Court eventually allowed Congress about six months, but Congress failed to act within that time. The Supreme Court refused to delay the effect of its ruling past December 24, 1982. Thus, on December 25, 1982, the bankruptcy courts apparently ceased to have any jurisdiction in cases under the 1978 Act.

The United States Court of Appeals for the Sixth Judicial Circuit and the United States District Court for this district attempted to avoid a complete collapse by enacting an emergency rule that became effective on December 25, 1982. Appendix A. The emergency rule in effect assumes that the district court has the bankruptcy jurisdiction under 28 U.S.C. §1471 and appoints the bankruptcy judges special masters or "referees" to exercise that jurisdiction, subject to some supervision by the district court.

This court can exercise jurisdiction in this proceeding only if (1) the Supreme Court's ruling in the Northern case does not apply even though the ruling has

become effective or (2) the emergency rule validly confers jurisdiction.

(1)

The ruling in Northern became effective on December 25, 1982. On that day it became the law of the United States that the bankruptcy courts as bankruptcy courts do not have jurisdiction to do anything in a case pending under the 1978 Act. The argument that the ruling in Northern applies only to cases filed after December 24, 1982, is unconvincing. But see Walter E. Heller & Co. v. Matlock Trailer Corp., Adv. No. 382-0755 (Bkcy. M.D. Tenn. Jan. 26, 1983). (In re Matlock Trailer Corp., Bk. No. 382-02778).

Most appellate court decisions are necessarily prospective only. However, when a decision strikes down a lower court's jurisdiction, the problem is whether the lack of jurisdiction should affect all orders previously entered by the lower court, since an order entered without subject matter jurisdiction is generally said to be void. 20 Am.Jur.2d, Courts §97 (1965). In the Northern case, the Supreme Court said that its decision would be prospective only. In other words, the court held that its decision would not affect orders that were already final.

Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in

> §241(a) is unconstitutional, we must now determine whether our holding should be applied retroactively to the effective date of the Act. Our decision in Chevron Oil Co. v. Huson, [citation omitted], sets forth three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. . . . In the present case, all of these considerations militate against retroactive application of our holding today. . . . We hold, therefore, that our decision today shall apply only prospectively. 102 S.Ct. 2880 (emphasis added).

The effect of the Supreme Court's delay of the effective date of its order in Northern was essentially the same as if it did not decide the case until its order became effective. Bankruptcy court orders that became final between the date of the Northern decision and the date it took effect were not affected by the lack of jurisdiction because the Northern order did not apply retroactively. Cf. United States v. Security Industrial Bank, --U.S.--, 103 S.Ct. 407, 410, --L.Ed.2d--, note 5 (1982).[2]

Nothing in Northern reasonably leads to the conclusion that it affects jurisdiction only in cases and proceedings filed after it took effect. The Supreme Court delayed the effect of Northern to preserve jurisdiction not just for cases and proceedings not yet filed but also for cases and proceedings already pending.

> The judgment of the District Court is affirmed. However, we stay our judgment until October 4, 1982. This limited stay will afford

> Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws . . . . 102 S.Ct. 2880 (emphasis added).

Furthermore, the cases cited by the Supreme Court dealt with the effect of a decision like Northern on orders that were final or actions that were taken without challenge before the decision. 102 S.Ct. 2880, note 9, citing Insurance Corp. v. Compagnie des Bauxite, --U.S.--, 102 S.Ct. 2099, 2104, note 9, 72 L.Ed.2d 492 (1982); Buckley v. Valeo, 424 U.S. 1, 142, 98 S.Ct. 612, 692, 46 L.Ed.2d 659 (1976); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 376-371, 60 S.Ct. 317, 319-320, 84 L.Ed. 329 (1940).

The Supreme Court was obviously concerned with protecting orders that were already final and with temporarily continuing the bankruptcy court's jurisdiction to enter orders. Indeed, jurisdiction is the power to make orders that will be legally binding not only on the persons affected but also on other courts.

This court must conclude that beginning on December 25, 1982, the bankruptcy courts as bankruptcy courts ceased to have jurisdiction to make any orders in cases or proceedings pending under the 1978 Act.

The next question is whether the emergency rule validly gave the bankruptcy judge the power to exercise the jurisdiction of the district court in bankruptcy cases. There are serious questions as to whether the district court has any bankruptcy jurisdiction.

The provisions of the 1978 Act that provided for a new bankruptcy court system were not to be effective until April 1, 1984. Pub.L.No. 95-598, §§201 & 402 (1978). In the "transition period" from October 1, 1979 through March 31, 1984, the "courts of bankruptcy" that existed under the prior bankruptcy statutes were continued as separate departments of the district court. Pub.L.No. 95-598, §404(a). Bankruptcy Act of 1898, §§1(10) & 2a, 11 U.S.C. §§1 & 11 (1976); discussed in In re Rivers, 19 B.R. 438, 455-458, 8 B.C.D. 1212, 1223-1224, 6 C.B.C.2d 210, 233-235 (Bkcy. E.D. Tenn. 1982); see also 1 Collier on Bankruptcy ¶2.01[d] (15th ed. 1982). The courts of bankruptcy under the Bankruptcy Act of 1898 were the federal district courts.

Though the new court structure was officially delayed until April, 1984, the courts of bankruptcy continued during the transition period were given the same jurisdiction that the new courts were to have. Pub.L.No.

95-598, §§241 & 405(b). It was this jurisdiction that the Supreme Court struck down in Northern. Specifically, the court struck down jurisdiction under 28 U.S.C. §1471, which provides:

> (a) Except as provided in subsection (b) . . . the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.
>
> (d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.
>
> (e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

The quoted statute vests jurisdiction in the district courts, but provides that the bankruptcy courts will exercise it to the exclusion of the district courts.

In Northern the Supreme Court could have struck down the limitation on district court action either completely or to the extent the bankruptcy courts could not constitutionally exercise jurisdiction. The Supreme Court specifically refused to take this course because it was contrary to Congress's intent to deny the district courts trial jurisdiction in bankruptcy cases under the 1978 Act. Footnote 40 of the plurality opinion explains:

> It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. [Citations omitted] Nor can we assume, as THE CHIEF JUSTICE suggests . . . that Congress' choice would be to have this case "routed to the United States district court of which the bankruptcy court is an adjunct." We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III, in a way that will best effectuate the legislative purpose.

102 S.Ct. 2880 (emphasis added).

Justices Rehnquist and O'Connor concurred in this result.

The argument has been made that the Supreme Court's decision in Northern did not affect the jurisdiction given to the district courts in subsections (a) and (b) of §1471. Braniff Airways, Inc. v. Civil Aeronautice Board, Misc. No. 4-221-E (U.S.D.C. N.D. Texas, Jan. 20, 1983) (In re Braniff Airways, Inc., Bkcy. No. 4-82-00369). The argument depends on reading §1471 as giving jurisdiction to the district courts. In Northern the Supreme Court recognized that §1471 denies the district courts jurisdiction and held that Congress, rather than the courts, should decide whether to give the district courts bankruptcy jurisdiction. The argument that Northern left the district courts with jurisdiction under §1471(a) & (b) must be rejected.

The question remains whether the district court has jurisdiction under any other statute. The statute that has been especially relied on is 28 U.S.C. §1334, which provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy.

This statute was in effect for many years while the Bankruptcy Act of 1898 was in effect, even though the Bankruptcy Act itself contained statutes granting jurisdiction to the district courts. 11 U.S.C. §§1 & 11 (1976). In light of those statutes, 28 U.S.C. §1334 was apparently unnecessary. The court has not found any explanation for its existence. It may have been enacted for the purpose of making title 28 comprehensive as to the jurisdiction of the federal courts.

In any event, 28 U.S.C. §1334 was not explicitly repealed by the 1978 Act, and the amended version, to deal only with appeals from the bankruptcy courts, was not to be effective until the end of the transition period. Pub.L.No. 95-598, §§238, 402 & 405. The result is that unamended 28 U.S.C. §1334 may be in effect, and it has not been held unconstitutional.

There are problems with holding that §1334 gives the district courts jurisdiction in bankruptcy cases under the 1978 Act. Though the bankruptcy courts were continued as separate departments of the "courts of bankruptcy" under the 1898 Act, which were the district courts, this continuation was basically irrelevant to the jurisdiction of the bankruptcy courts in cases under the 1978 Act. As to cases under the 1978 Act, the bankruptcy courts were given

jurisdiction under 28 U.S.C. §1471 to the exclusion of the district courts. This leads to two arguments - first, that 28 U.S.C. §1334 remains in effect only to preserve jurisdiction in cases pending under the 1898 Act, and second, that it would be contrary to Congress's intent and inconsistent with the Supreme Court's decision in Northern to hold that the district courts have jurisdiction under §1334 of cases under the 1978 Act.

The latter argument focuses on Congress's intent in the 1978 Act to deny the district courts jurisdiction in bankruptcy and the Supreme Court's refusal in Northern to allow the district courts jurisdiction. On the other hand, Congress surely intended that some federal court have bankruptcy jurisdiction. In the absence of any federal court jurisdiction, there will apparently be no court with jurisdiction to accept the filing of cases or administer cases filed under the 1978 Act.

In the Braniff case, cited above, Judge Mahon concluded that §1334 did give the district courts jurisdiction of cases under the 1978 Act:

> It may be argued that Congress, in writing the new version of 28 U.S.C. §1334 . . . intended that the old §1334 would apply only to cases filed before October 1, 1979.
>
> However, if the new grant of original and exclusive jurisdiction in 28 U.S.C. §1471 - which was meant to repeal and replace the old §1334 for

cases filed after October 1, 1979 - is unconstitutional and no longer valid, the court must now read the bankruptcy laws as if the new §1471 had not been written. See Frost v. Corporation Commission of Oklahoma, 278 U.S. 515, 526-527 (1929); Davis v. Wallace, 257 U.S. 478, 485 (1922). In so doing, the court finds that old §1334 places the original and exclusive jurisdiction over bankruptcy matters and proceedings in the district court.

Section 1334 was recognized as giving the bankruptcy courts only so-called "summary" jurisdiction in cases under the 1898 Act. Wright, Miller & Cooper, Federal Practice & Procedure §3570 (1975). Adopting §1334 for cases under the 1978 Act would revive the problem of split bankruptcy jurisdiction that the unconstitutional provisions of the 1978 Act were intended to cure. Since Congress has failed to cure the constitutional defect, the courts may find it necessary to return to the former inefficient system.[3] There appears to be no other way to preserve a remnant of federal court jurisdiction and thereby prevent great injustice to thousands of debtors and creditors.

The court, however, need not go so far as to hold that the district court has bankruptcy jurisdiction under 28 U.S.C. §1334 in cases under the 1978 Act. Assuming it does, the question arises whether this action is within that jurisdiction.

Section 1334 was not changed by the 1978 Act, until 1984. It must be interpreted as it would be in cases under the 1898 Act. In this action the trustee seeks to recover from the bank a money judgment for $400,000 on the ground that a $400,000 payment to the bank shortly before the bankruptcy was a preferential transfer. Thus, this is not an action involving property in the court's constructive possession. Under the 1898 Act, this action would be classified as a controversy at law or in equity between a trustee and an adverse claimant and not involving property in the court's constructive possession. Such an action is not within the district court's summary jurisdiction under §1334. Compare Flanders v. Coleman, 250 U.S. 223, 39 S.Ct. 472, 63 L.Ed.948, 43 A.B.R. 563 (1919) and Bardes v. Hawarden Bank, 176 U.S. 524, 20 S.Ct. 1000, 44 L.Ed. 1175, 4 A.B.R. 163 (1900). See also Schumacher v. Beeler, 293 U.S. 367, 55 S.Ct. 230, 79 L.Ed.433 (1934). See generally 2 Collier on Bankruptcy ¶23.04, 23.06[9] & 23.15 (14th ed.). The result is that the district court could not have jurisdiction of this action under 28 U.S.C. §1334. The parties have not argued that the district court would have jurisdiction without regard to the bankruptcy. Accordingly, this action must be dismissed.

In light of the court's conclusion that the district court lacks jurisdiction, there is no need to consider the legality of the emergency rule. Assuming the rule is valid, it can only confer bankruptcy jurisdiction which the district court has, and in this action it has no bankruptcy jurisdiction.

The court has decided only that it lacks jurisdiction of this particular complaint. An order will be entered accordingly.

This memorandum constitutes findings of fact and conclusions of law. Bankruptcy Rule 752.

At Chattanooga, Tennessee.

BY THE COURT

Ralph H. Kelley
United States Bankruptcy Judge

Footnotes

[1]102 S.Ct. 2880, note 40, (plurality opinion) and concurrence by Justices Rehnquist and O'Connor, per Justice Rehnquist as follows:

> I would . . . hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit . . . to be violative of Art. III of the . . . Constitution. Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority . . . under §241(a) . . . I concur in the judgment. . . . 102 S.Ct. 2882 (emphasis added).

[2]"Appellee . . . asserts that the judgments should be affirmed because the Act violates Article III of the Constitution . . . . See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ... Because our decision in Northern Pipeline is prospective only . . . and because we have stayed the issuance of our mandate in that case to December 24, 1982 . . . that decision does not affect the judgment in this case."

[3]The Supreme Court's refusal in Northern to restructure jurisdiction under the unconstitutional statute does not necessarily preclude the finding of jurisdiction under another statute.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

IN RE:	:	
IRVING M. STILLMAN, M.D.	:	Case No. 81-1-0964
Debtor	:	
- - - - - - - - - - - - - - - -	:	
CHARLES A. DOCTER, Trustee	:	
Plaintiff	:	
vs.	:	
DENNIS A. GLEICHER, M.D. LEWIS B. NEWBERG, M.D. THE HOWARD COUNTY DOCTORS' BUILDING LIMITED PARTNERSHIP	:	Adversary Proceeding No. 82-0073A
Defendants	:	

FILED
JAN 13 1983
CLERK'S OFFICE
US BANKRUPTCY COURT
DISTRICT OF MARYLAND

MEMORANDUM OF OPINION

On January 4, 1983, defendants, Dennis A. Gleicher, M.D., Lewis B. Newberg, M.D., and The Howard County Doctors' Building Limited Partnership, filed a motion to dismiss the amended complaint for lack of subject matter jurisdiction. For the reasons set forth herein, the court has signed an order denying the motion. Defendants urge that the United States District Court for the District of Maryland likewise lacks subject matter jurisdiction. This court need not resolve that question and, therefore, does not address it in this opinion.

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Statement of the Case

This is an action filed by Charles A. Docter, trustee of the estate of Irving M. Stillman, M.D., against Dennis A. Gleicher, M.D., Lewis B. Newberg, M.D., and The Howard County Doctors' Building Limited Partnership. The amended complaint recites that Drs. Stillman, Gleicher, and Newberg were general partners of The Howard County Doctors' Building Limited Partnership, each holding a 25% interest in the limited partnership as general partners. The sole asset of the partnership is said to be an office building located in Howard County, Maryland. The amended complaint further alleges that in August, 1978, Dr. Stillman owed $7,000.00 to the partnership for rent. The others each loaned him $3,500.00 which he endorsed to the partnership for the back rent. In addition, Dr. Stillman signed a Promissory Note and Security Agreement and a Financing Statement whereby he gave Drs. Gleicher and Newberg a security interest in his 25% share of the partnership as security for the $7,000.00 loan. Plaintiff alleges that the value of the 25% interest was $150,000.00 over and above the outstanding liens and encumberances.

On April 3, 1979, Drs. Gleicher and Newberg filed an amended partnership certificate purporting to forfeit Dr. Stillman's 25% interest as general partner. At that time, the interest was said to be worth $150,000.00. Plaintiff contends that the forfeiture did not comply with UCC §9-505, MD COM. LAW

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CODE ANN. §9-505 (1975), and that §9-505 did not apply to the transaction.

In Count I, the plaintiff/trustee seeks the redemption of Dr. Stillman's interest and the sale of the partnership property with remittance of the share of the debtor to the trustee. In the alternative, the trustee seeks the sale of the property and the distribution of Dr. Stillman's share to the trustee, minus any amounts due Drs. Gleicher and Newberg. In Count II, the trustee seeks a declaration that the transfer of Dr. Stillman's share to Drs. Gleicher and Newberg was a fraudulent conveyance under MD COM. LAW CODE ANN. §15-204 (1975) (The Maryland Uniform Fraudulent Conveyance Act).

Defendants' Contentions

Defendants argue:

"I. THIS COURT HAS NO SUBJECT MATTER JURISDICTION.

The Supreme Court of the United States, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., _____ U.S. _____, 102 S. Ct. 2858 (1982), held that the broad grant of jurisdiction to the bankruptcy courts set forth in 28 U.S.C. §1471 (1976 ed., Supp. III) violates Article III of the Constitution. Although the Supreme Court stayed its judgment until December 24, 1982, to permit Congress to enact remedial legislation, Congress has taken no action to reconstitute the bankruptcy courts.

In Marathon, the debtor's complaint for breach of contract and misrepresentation was based solely on state law. 102 S. Ct. at 2878. Similarly, in the instant proceeding, the trustee's causes of action are derived entirely from state law. Specifically, the trustee seeks in Count I of the amended complaint to redeem, and then to sell, collateral that was forfeited following the debtor's default under a security agreement. The trustee's cause of action under Count I is governed by Article 9 of the Uniform Commercial Code, as enacted in Maryland (Md. Com. Law Code Ann. §9-101 et. seq.) In Count II, the trustee seeks to avoid the forfeiture as a fraudulent conveyance, pursuant to Md. Com. Law Code Ann. §15-204.

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The Supreme Court held that, 'at the very least, the new bankruptcy judges cannot constitutionally be vested with the jurisdiction to decide this state-law contract claim . . . . .' Id. at 2880 n. 40. Both the plurality and the concurring justices agreed that the broad grant of authority to the bankruptcy courts to decide solely state law issues was not readily severable from the remaining grant of authority. See id., id. at 2882. As a result, the bankruptcy courts have no jurisdiction over any cases under title 11 of the United States Code, or civil proceedings arising under title 11 or arising in or related to cases under title 11. Accordingly, this Court has no subject matter jurisdiction over the adversary proceeding herein, and must dismiss the trustee's amended complaint."

Conclusions of Law

Pursuant to the judgment of the Supreme Court in Marathon, supra, this court was divested of all jurisidction granted it by §241(a) of the Bankruptcy Act of 1978, Pub. L 95-598, 92 Stat. 2549. This court would therefore be without jurisidction to try any matter but for the fact that on December 20, 1982, the Judicial Council of the Fourth Circuit, acting pursuant to 28 U.S.C. §332(d), directed the District Courts of the Fourth Circuit to adopt a model emergency resolution for the administration of the bankruptcy system in the circuit. That resolution was adopted on December 22, 1982, (and amended January 5, 1983, nunc pro tunc) by the Judges of the United States District Court for the District of Maryland in the independent exercise of their discretion as Local Rule No. 51-A.1/

1/ Local Rule 51-A(c) and (d) of the United States District Court for the District of Maryland, provides:

(c) Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil pro-

1/ continued

ceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct;

(A) a proceeding to enjoin a court:

(B) a proceeding to punish a criminal contempt --
(i) not committed in the bankruptcy judge's actual presence; or
(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (d)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or district judge.

1/ continued

(3) (A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(B) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

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Defendants would have this court declare the model rule unconstitutional as being inconsistent and in conflict with the holding of the Supreme Court in Marathon. This court declines to do so.

It is agreed among all commentators that the model rule is not the permanent remedy to the jurisdictional vacuum created by Marathon. At the Senate Hearings, National Conference on the Resolution of the Bankruptcy Crisis, held January 7, 1983, the draftsmen of the model rule and its proponents noted that the rule is a temporary, interim, stop-gap measure. It is not perfect, but it is a "band-aid" designed to facilitate the handling of the large majority of the cases filed under Title 11, the consumer no-asset liquidation bankruptcies. As was suggested at the conference by Judge Robert L. Ordin of the United States Bankruptcy Court for the Central District of California, the need of the public in the existing emergency is served best by making the rule work as well as it can until Congress acts. This court is committed to that effort. While it is is true that the model rule has been the subject of criticism by the Department of Justice,2/ it would be an act of judicial anarchy for this court

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2/ Statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy before the Subcommittee on Courts, Committee on the Judiciary, United States Senate, concerning Omnibus Bankruptcy and Court Reform Ligislation on November 10, 1982:

"The Administrative Office of the United States Courts has promulgated a proposed district court local rule to govern the operation of the bankruptcy courts

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2/ continued

after December 24 if no legislation is adopted. The proposed rule assigns to the bankruptcy courts in each district the district court's jurisdiction over '[a]ll cases under Title 11 and all civil proceedings arising in or related to cases under Title 11.' Proposed Rule (b)(1). District courts are authorized to withdraw any reference to a bankruptcy judge, in whole or part, upon the court's own motion or the motion of a party. Id., (b)(2). In addition, the district courts must review de novo any proposed judgment of a bankruptcy court in any proceeding 'related to' but not 'arising under' a case under Title 11 and in any other proceeding where such de novo review is constitutionally required. Id., (c)(3), (c)(5)(A)(iii), (c)(5)(B). However, the proposed rule does not define those other cases in which district court de novo review is constitutionally required.

We are uncertain whether the proposed rule would withstand a judicial challenge. The proposed rule is based on the assumption that the Court's decision has left untouched the broad bankruptcy jurisdiction conferred upon the district courts by Section 241(a) of the Act, in 28 U.S.C. 1471(a) and (b). In fact, it is unclear whether the Court's holding may be limited in that fashion. See 102 S. Ct. at 2880 n.40 (plurality opinion); id. at 2882 (Rehnquist, J., concurring). Furthermore, there are serious questions whether the proposed rule legitimately may assign to the bankruptcy courts significant portions of the district courts' broad bankruptcy jurisdiction under the Act, since this is precisely what the Court refused to do in holding that the jurisdiction which the bankruptcy courts cannot constitutionally exercise could not be severed from the remainder of the jurisdiction conferred on the bankruptcy courts under the 1978 Act."

See also, Vern Countryman, Statement of National Bankruptcy Conference in Opposition to Proposed Judicial Conference Rule (1982).

not to follow a rule adopted unanimously by the judges of its appellate court. That rule must be given effect. Cf. Mesa Farm Co. v. United States, 475 F.2d 1004, 1007-1008 (9th Cir. 1973); see also, Udall v. Tallman, 380 U.S. 1, 16 (1965). Disobedience of the rule would be a dereliction of duty. Bankruptcy Act of 1978, Section 404(d) [making applicable Section 34 of the old Bankruptcy Act, 11 U.S.C. §62 (1976) (Repealed 1978)].

An order will be entered in accordance with this opinion.

Paul Mannes

DATED: January 13, 1983

PAUL MANNES, Judge
United States Bankruptcy Court
for the District of Maryland

cc: Marcia Docter, Esq.
Harvey Lebowitz, Esq.

Copies mailed: 1/13/83

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